

**BIENNIAL REPORT**  
**of the**  
**ATTORNEY GENERAL**  
**STATE OF FLORIDA**

**From January 1, 1959, through December 31, 1960**

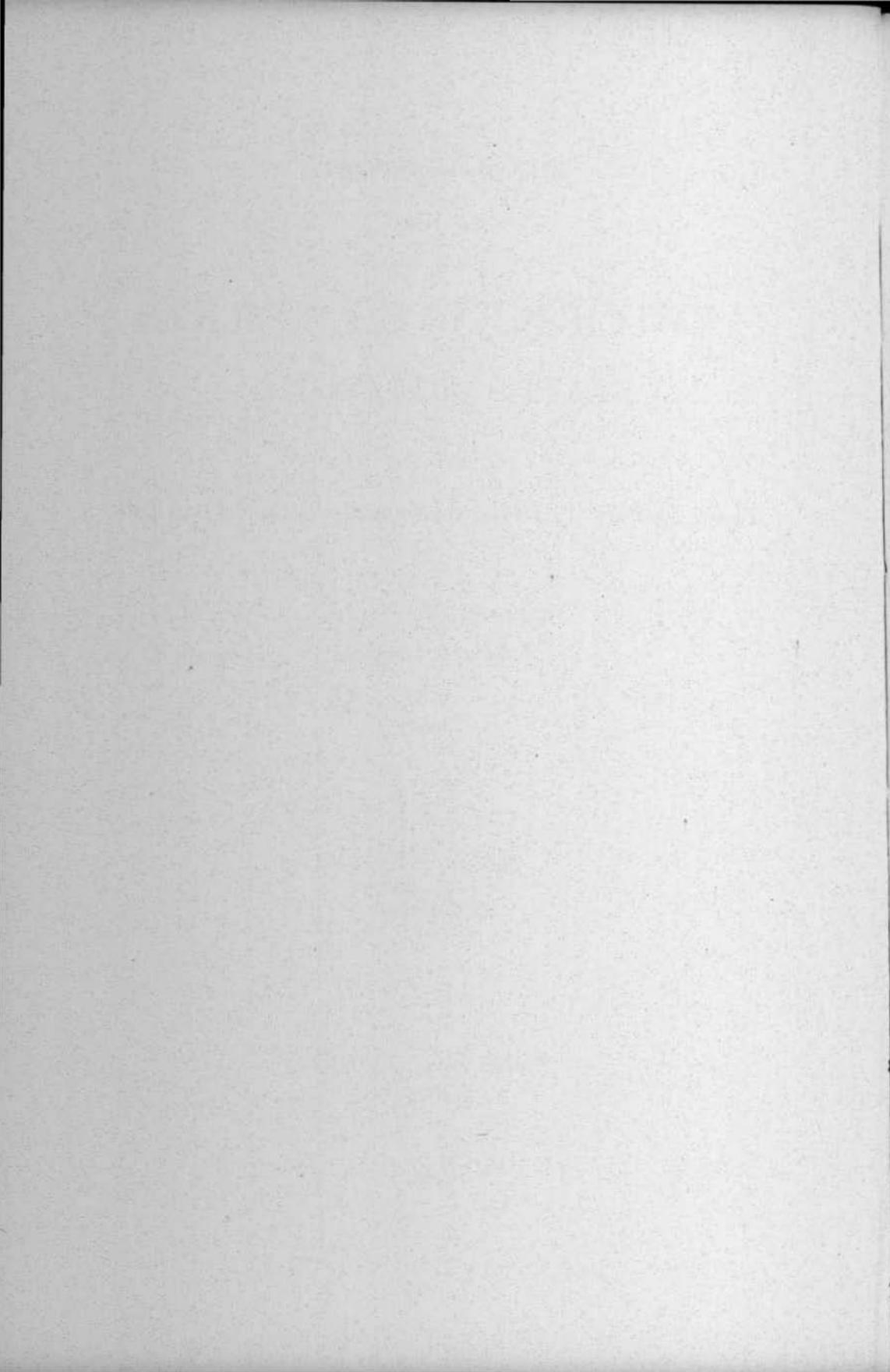
**RICHARD W. ERVIN**  
*Attorney General*



**Tallahassee, Florida**  
**1961**



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**RICHARD W. ERVIN**  
ATTORNEY GENERAL

**STATE OF FLORIDA**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
TALLAHASSEE

January 3, 1961

**LETTER OF TRANSMITTAL**

**TO HIS EXCELLENCY**  
**HONORABLE C. FARRIS BRYANT**  
**GOVERNOR OF FLORIDA**

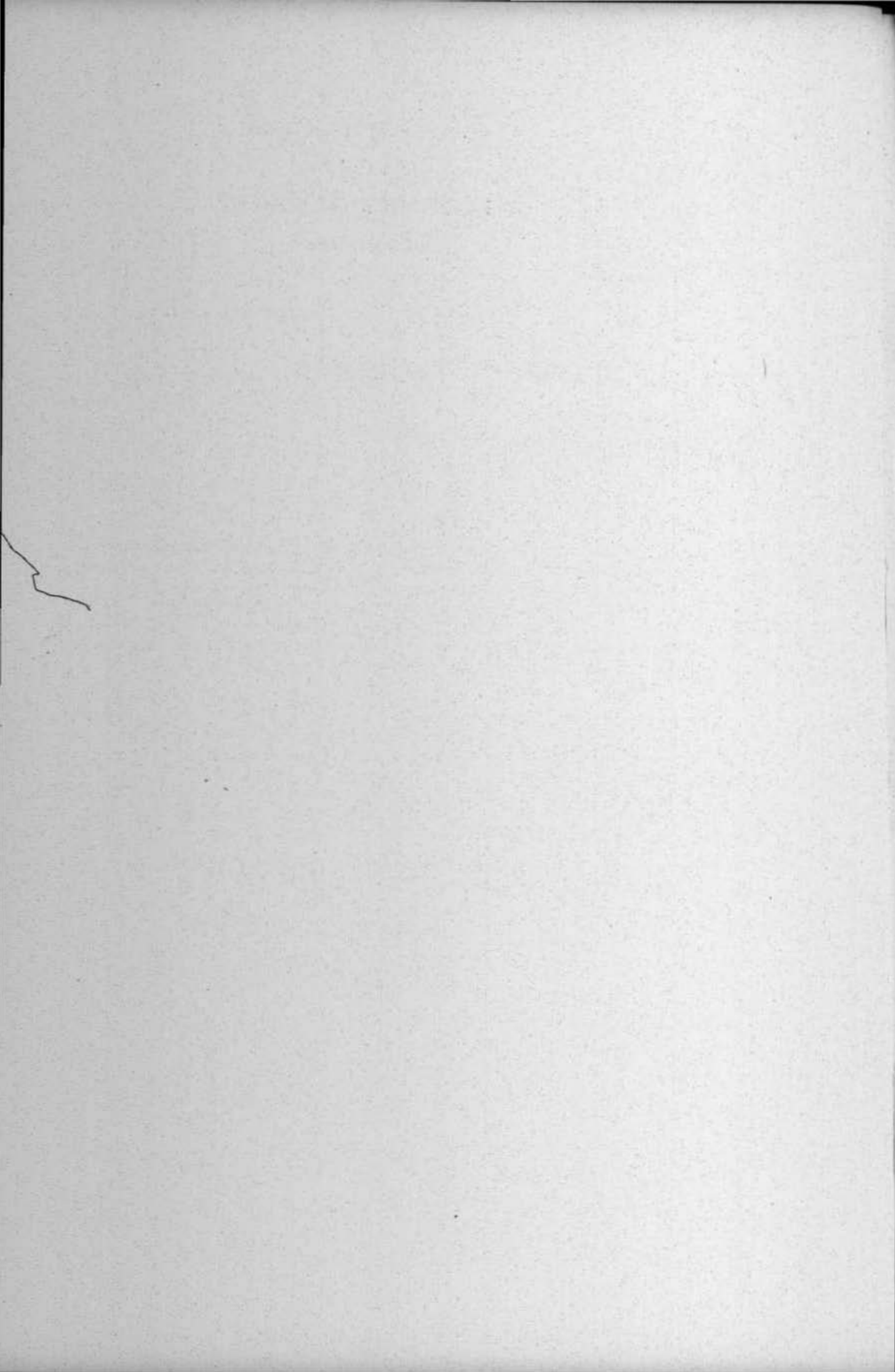
**SIR:**

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1959 through December 31, 1960. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

This report includes opinions of general interest rendered during two calendar years, advisory opinions of the Supreme Court to the Governor, a listing of former Attorneys General, the constitutional and statutory duties of the Attorney General and the personnel of my office during the past two years. Opinions are numbered numerically as released and identified by the year and number beginning with opinion No. 1 as "59-1."

Statutes and constitutional sections cited and subject index may be found in the last portion of the report.

Respectfully submitted,  
**RICHARD W. ERVIN**  
ATTORNEY GENERAL



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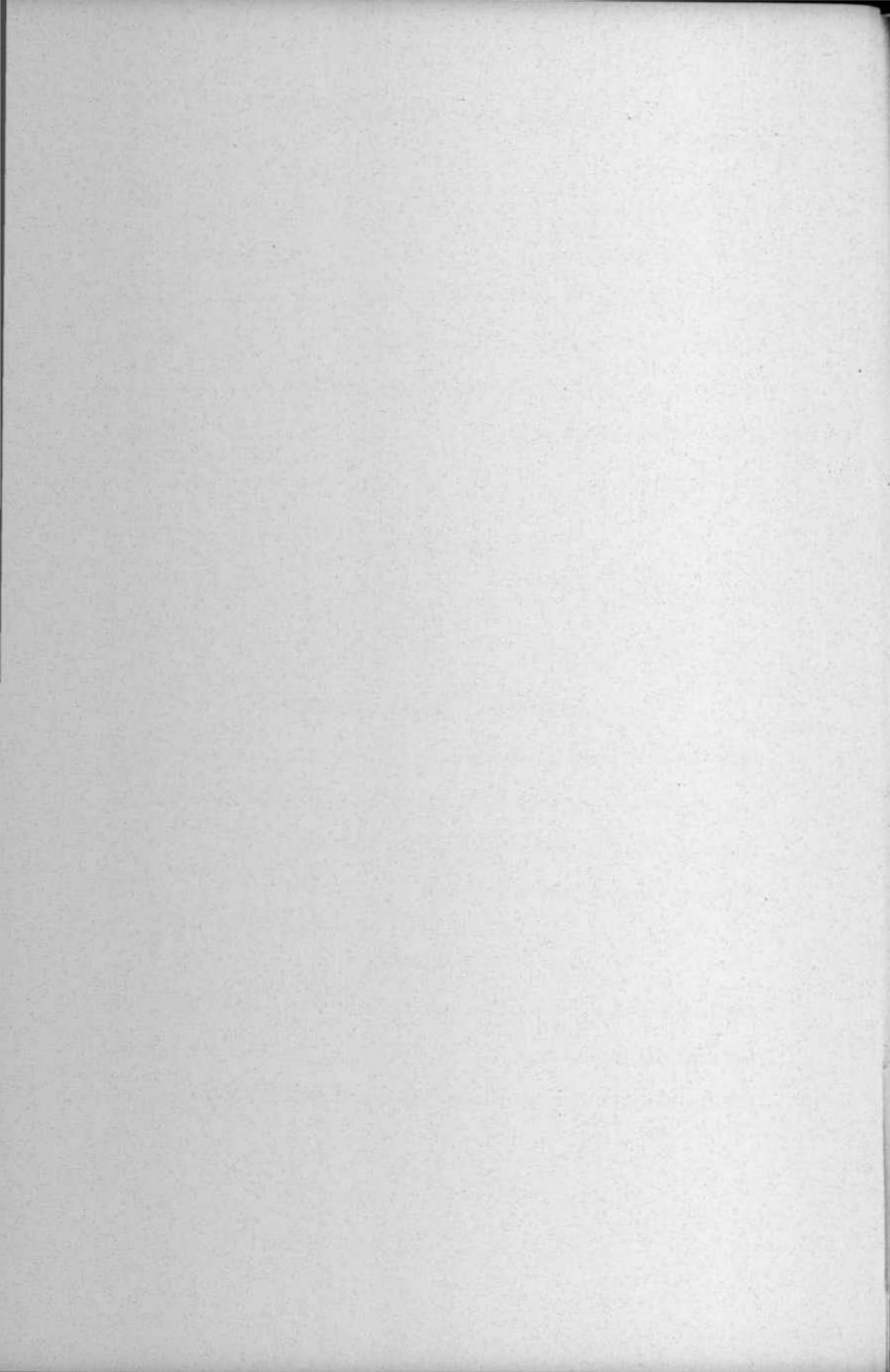
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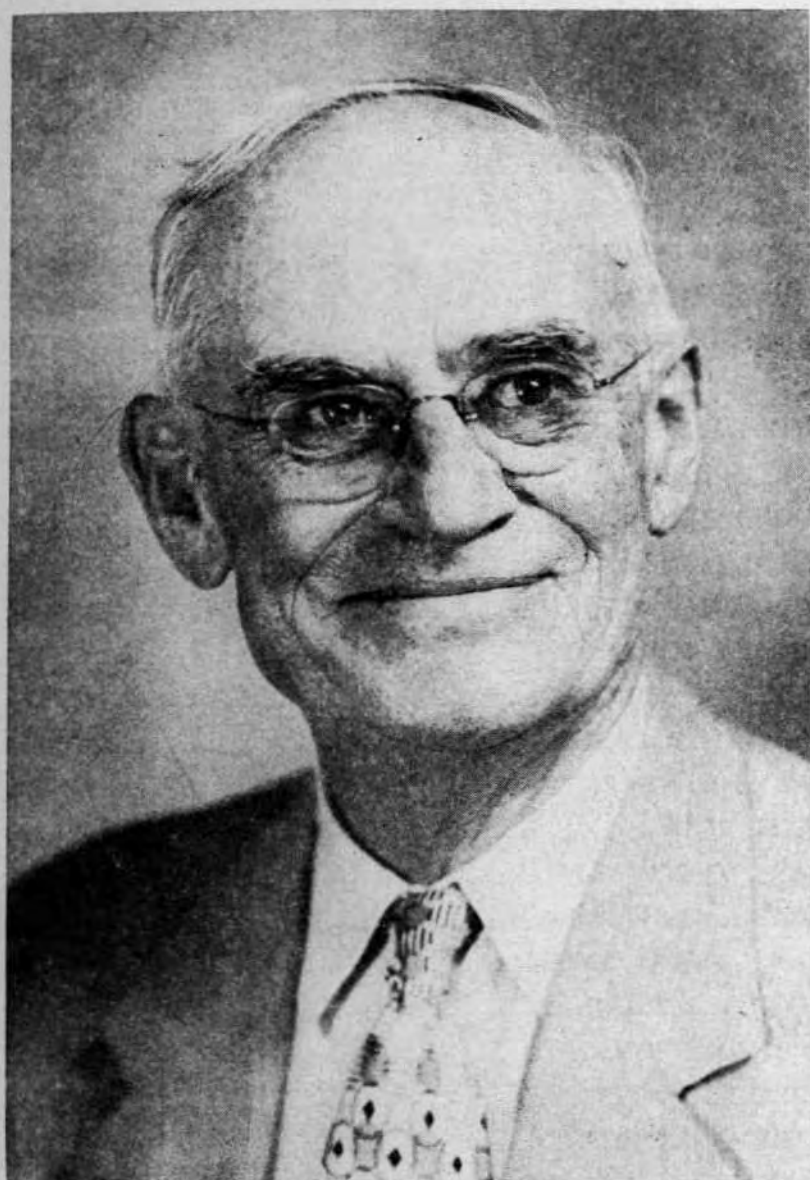
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# ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

|                        |           |
|------------------------|-----------|
| JOSEPH BRANCH          | 1845-1846 |
| AUGUSTUS E. MAXWELL    | 1846-1848 |
| JAMES T. ARCHER        | 1848-1848 |
| DAVID P. HOGUE         | 1848-1853 |
| MARIANO D. PAPY        | 1853-1860 |
| JOHN B. GALBRAITH      | 1860-1868 |
| JAMES D. WESTCOTT, JR. | 1868-1868 |
| A. R. MEEK             | 1868-1870 |
| SHERMAN CONANT         | 1870-1870 |
| J. P. C. DREW          | 1870-1872 |
| H. BISBEE, JR.         | 1872-1872 |
| J. P. C. EMMONS        | 1872-1873 |
| WILLIAM A. COCKE       | 1873-1877 |
| GEORGE P. RANEY        | 1877-1885 |
| C. M. COOPER           | 1885-1889 |
| WILLIAM B. LAMAR       | 1889-1902 |
| JAMES B. WHITFIELD     | 1903-1904 |
| W. H. ELLIS            | 1904-1909 |
| PARK TRAMMELL          | 1909-1913 |
| THOMAS F. WEST         | 1913-1917 |
| VAN C. SWEARINGEN      | 1917-1921 |
| RIVERS BUFORD          | 1921-1925 |
| J. B. JOHNSON          | 1925-1927 |
| FRED H. DAVIS          | 1927-1931 |
| CARY D. LANDIS         | 1931-1938 |
| GEORGE COUPER GIBBS    | 1938-1941 |
| J. TOM WATSON          | 1941-1949 |
| RICHARD W. ERVIN       | 1949-     |



**In Memoriam**

T. PAINE KELLY



## THOMAS PAINE KELLY

Thomas Paine Kelly was born in Blackburn, England, October 15, 1883, of Irish-English descent, son of Miles Kelly and Joanna Marsden Kelly, and passed away at Tallahassee Memorial Hospital, Tallahassee, Florida, December 6, 1960. Immediate survivors besides his widow, the former Beatrice Gent of Philadelphia, are a daughter, Mrs. W. B. Howard, Jr., of Jacksonville, Florida, two sons, T. Paine Kelly, Jr., of Tampa, and Major Marsden G. Kelly, now serving with the United States Army Air Force in Japan, and eight grandchildren.

Soon after his birth Mr. Kelly's family came to America and settled near Philadelphia. Mr. Kelly was graduated from the Media High School in Glen Riddle, Pennsylvania, at the age of seventeen, and was valedictorian of his class. He then began studying law in a Philadelphia law office but due to prevailing circumstances did not pursue that study for long. In 1908, while working as travel agent for the American Line Steamship Company, he again became interested in the study of law. For four years he worked during the day and studied at night, and was graduated from Temple University Law School in Philadelphia in 1912.

Mr. Kelly moved to Tampa, Florida, soon after his graduation. Upon taking the bar examination he was admitted to practice in the Florida Courts as well as the Federal Courts. His many years of active practice and his high standard of ethics won for him the deep respect and esteem of the members of his profession. Mr. Kelly was recognized as an authority on corporation law, and for over twenty years he was Division Counsel for the Atlantic Coast Line Railroad at Tampa. While living in Tampa he also represented the State Road Department in Hillsborough County and served as a member of the State Welfare Board as an appointee of Governor Cone.

Mr. Kelly served as an Assistant Attorney General from July, 1945, to May, 1960, under Attorneys General J. Tom Watson and Richard W. Ervin. During this period of time he was legal representative for the State Road Department, the Livestock Board, and the Game and Fresh Water Fish Commission and handled legal matters relating to abstracts and titles, bond validation, condemnation and land foreclosures.

Mr. Kelly loved his work and took great pride in serving the state. He will long be remembered with respect and affection by the many friends he made in his public as well as his private life.

# ORGANIZATION OF ATTORNEY GENERAL'S OFFICE

RICHARD W. ERVIN  
ATTORNEY GENERAL

December 1960

J. ROBERT McCLURE  
FIRST ASSISTANT

*Office Management*

*Personnel*

*Finance*

*Council of State Governments*

*Secretaries*

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BRUCE JACOB

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Governor  
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Licenses  
Retirement  
Tax Assessors  
Tax Collectors  
Tax Questions*

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Board of Administration  
Bond Validation  
Budget Commission  
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Institutions  
Contracts, Building  
County Clerks  
County Commissioners  
County Judges  
Division of Corrections  
Financial Responsibility Law  
Fire College  
Fire Marshal  
Industrial Commission  
Insurance Commissioner  
Merit System  
Sheriffs  
Treasurer*

JOSEPH C. JACOBS  
SAM SPECTOR

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Atlantic States Marine  
Fisheries Commission  
Avocado and Lime Commission  
Barber Board  
Citrus Commission  
Conservation Department  
Dental Board  
Department of Public Safety  
Development Commission  
Flood Control  
Funeral Directors  
Game and Fresh Water Fish  
Commission  
Highway Patrol  
Labor Relations  
Land, Oil, Gas, and Water  
Livestock Board  
Marketing Board  
Medical Board  
Milk Commission  
Motor Vehicle Commission  
Securities Commission  
Soil Conservation  
State Road Department  
Tuberculosis Board  
Water Resources  
Weights Division, S.R.D.*

MARY SCHULMAN

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Air Pollution Control Commission  
Anatomical Board  
Architects  
Basic Sciences  
Beauty Board  
Board of Health  
Children's Commission  
Chiropody Board  
Crippled Children's Commission  
Dispensing Opticians  
Harbor Masters  
Juvenile Courts  
Library Board  
Massage Board  
Medical Technology Board  
Mosquito Control  
Naturopathic Board  
Nurses  
Nursing Homes and Hospitals  
Optometrist Board  
Osteopathic Board  
Pest Control  
Physical Therapists  
Pilot Commission  
Psychology  
Real Estate Commission  
Veterinary Board  
Welfare Board*

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B. KEMP HASKELL

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Board of Education  
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Department of Education  
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Florida Nuclear Development  
Commission  
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|   | <sup>1</sup> <b>LAKELAND OFFICE:</b><br>209 Carter Building<br>122 S. Kentucky Avenue<br>Lakeland, Florida<br>Phone—MUtual 2-8353   | <sup>2</sup> <b>MIAMI OFFICE:</b><br>Suite 530, State Office Building<br>1350 N.W. 12th Avenue<br>Miami 36, Florida<br>Phone—FRanklin 9-3636   |

The Lakeland and Miami offices deal exclusively with Criminal Appeals. Any inquiry concerning other matters should be addressed to the Attorney General at the Tallahassee office in the Capitol.

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\*Resigned

\*\*Deceased

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Drafting, Assistant  
Attorney General

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ROSE D. KITCHEN..... Indexer, Editor, Assistant

\*T. DAVID BURNS..... Special Assistant

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\*Resigned

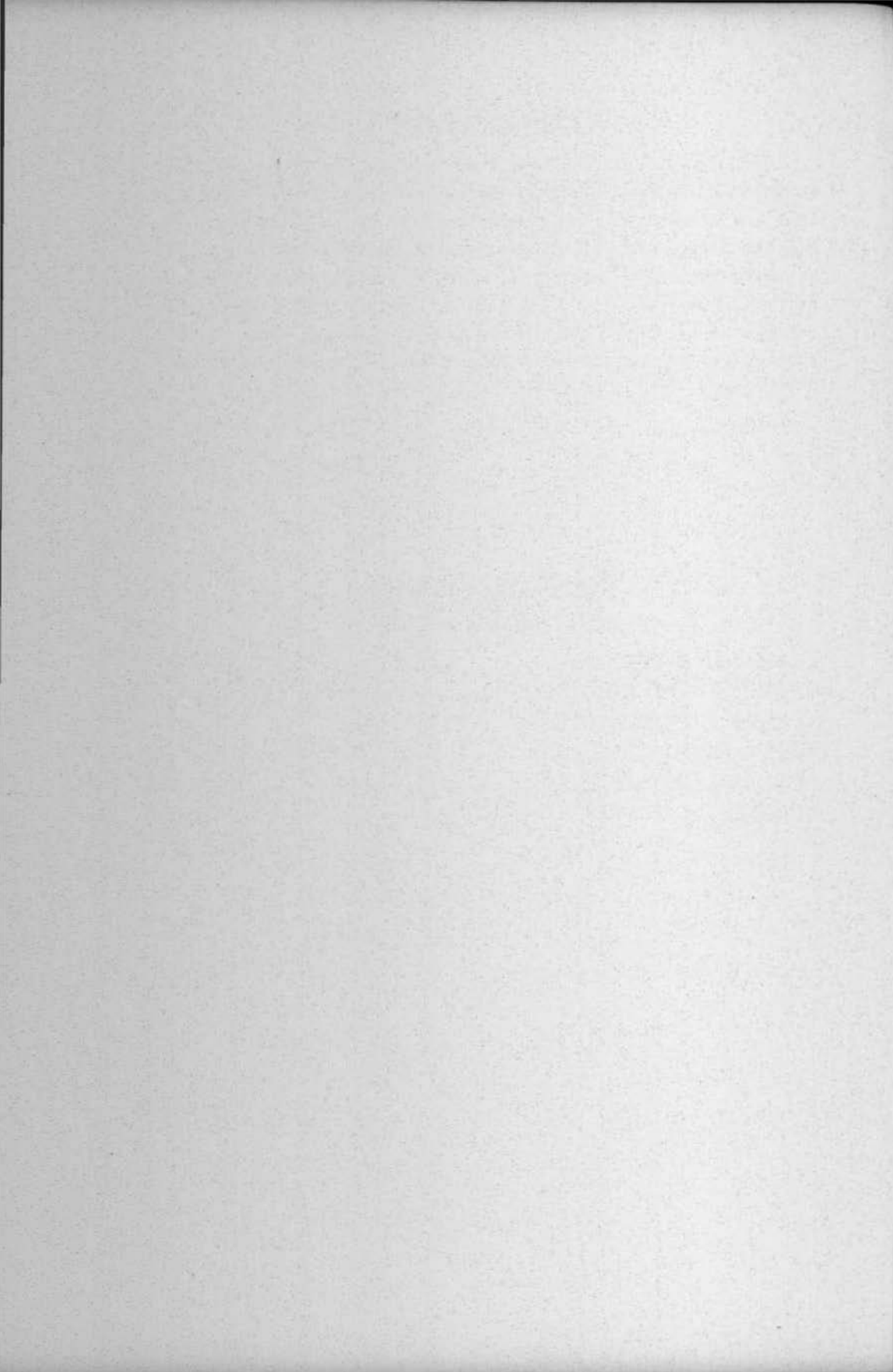
## EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of omitted opinions listed immediately preceding the alphabetical index.

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## BIENNIAL REPORT EDITORIAL STAFF

|                       |                         |
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| J. ROBERT McCLURE     | <i>First Assistant</i>  |
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| DOROTHY M. STARK      | <i>Copy Editor</i>      |





**BIENNIAL REPORT**  
**of the**  
**ATTORNEY GENERAL**  
**State of Florida**

**January 1, 1959, through December 31, 1960**

**059-1—January 5, 1959**

**PUBLIC LANDS AND PROPERTY**

**TRUSTEES OF I. I. FUND—SALE OF SUBMERGED LANDS—  
MANATEE COUNTY—§§253.06-253.15, 271.01 (REPEALED  
IN 1957), 270.08 AND CH. 253, F. S.; CHS. 791, 1856;  
6451, 1913; 6960, 1915; 7304, 1917; 8537, 1921; 57-362.**

*To: Van H. Ferguson, Director, Trustees of the I. I. Fund, Tallahassee*

**QUESTIONS:**

1. Does a bulkhead line established so that it precludes "A" from filling adjacent to his upland permit the applicant, "B," an adjoining upland owner who is not so precluded, to purchase that part of a spoil bank which extends in front of "A's" upland?

2. May a spoil bank, separated from the mainland by an artificial channel, be sold at competitive bids rather than to the upland owner?

In order to answer these questions, it is necessary to review the facts which have prompted your letter. The land proposed to be sold is a spoil bank which was created by the development of the intracoastal waterway. The applicant, who wishes to purchase the island and submerged lands surrounding it, owns a substantial portion of the upland fronted by the spoil bank. A portion of the spoil bank extends in front of, and lies between the land of another upland owner and the intracoastal waterway. There is, however, an artificial channel approximately 70 feet wide between the mainland and the spoil bank. This owner has objected to the proposed sale of the land which lies immediately across the artificial channel from his upland. With this factual background I will proceed to answer your specific questions.

**AS TO QUESTION 1:**

Section 253.12, F. S., provides the trustees of the internal improvement fund with authority to sell and convey islands and submerged lands *when it is determined by the trustees that such sale will not be contrary to the public interest.* The act provides that lands lying between the ordinary high water line and a bulkhead line established pursuant to §253.122, F. S., shall be sold only to the upland riparian owner. This qualification is evidently based upon the riparian rights of an upland owner to an unobstructed view of, and access to the water fronting his upland, and the intent of the bulkhead act was to maintain this common law right. The Flor-

ida supreme court held in *Hayes v. Bowman*, 91 So. 2d 795, that the common law riparian rights to an unobstructed view and access to the channel must be recognized over an area as near as practicable in the direction of the channel. The court in this case recognized the fact that riparian rights cannot be defined over a particular area with "mathematical exactitude," but they should be preserved as nearly as practicable in the direction of the channel in order to equitably distribute the submerged lands.

In the instant factual situation the bulkhead line as established precludes "A" from purchasing beyond the artificial channel. The riparian rights of an upland owner should be measured as nearly as practicable in the direction of the channel (*Hayes v. Bowman*, supra). "B" is not, by reason of his upland ownership, permitted to purchase submerged land lying in front of another upland owner (§253.12, F. S.). The bulkhead act gives only the upland owner a preference to purchase the submerged land riparian to his upland, i. e., that lying between his upland and the channel.

Based upon the above, I do not feel the applicant is a riparian upland owner under the provisions of §253.12, F. S.

Question 1 is answered in the negative.

#### AS TO QUESTION 2:

As stated in the discussion of question 1, the supreme court has held riparian rights should be extended as nearly as practicable in the direction of the channel.

The effect of a channel upon riparian rights in Florida can be determined only after an examination of previous Florida laws which were either amended or repealed by the passage of Ch. 57-362. The first of these laws, Ch. 6451, laws of 1913, and Ch. 6960, laws of 1915, vested in the trustees of the internal improvement fund title to all islands, sand bars and shallow banks located in the tidal waters of Dade, Monroe and Palm Beach counties, "... upon which the water is not more than three feet deep at high tide, and which are separated from the shore by a channel or channels not less than five feet deep at high tide. ..." (Emphasis supplied.)

The legislature, by Ch. 7304, laws of 1917, vested title in the trustees of the internal improvement fund, under like conditions and limitations to those of the 1913 and 1915 acts, to:

(1) islands, sandbars and shallow banks, (2) small islands made by the process of dredging of the channel by the United States government, located in the tidal waters ... of the State of Florida, (3) similar or other islands, sandbars, and shallow banks upon which the water is not more than three feet deep at high tide and which are separated from the shore by a channel not less than five feet deep at high tide, and (4) sandbars and shallow banks along the shore of the mainland, in which the title is not, at this date, invested in prior parties. (Emphasis supplied.) (*Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, text 863).

Section 271.01, F. S., prior to its repeal by Ch. 57-362, authorized an abutting or upland owner to fill submerged sovereignty lands "covered by water lying in front of any tract of land owned by ... any person, natural or artificial ... upon any navigable stream or bay of the sea or harbor, as far as the edge of the channel. ..." (Emphasis supplied.) This statute vested title in



the upland owner actually filling in such lands in accordance with the statute. (*Stein v. Brown Prop.*, Fla., 104 So. 2d 495; *Hayes v. Bowman*, supra; *Duval Eng. and Constr. Co. v. Sales*, Fla., 77 So. 2d 431).

Under the Butler act (§271.01, F. S.), as well as the original act (Ch. 791, acts of 1856), the right of the upland owner to fill in or improve the submerged lands adjacent to his upland was confined to the area between the high water mark and the channel.

It appears from the above and foregoing observations that under the acts of 1856 and 1921 (Ch. 271, F. S.) and the acts of 1913 and 1915 (Ch. 6451 and 6960, §§253.06-253.11, F. S.), and also one class of the lands mentioned in the 1917 act (Ch. 7304, acts of 1917; §§253.12-253.15, F. S.), the channel of the navigable waters was a material limitation, both upon the filling in and improvement of submerged lands, and the sale of the same by the trustees. These limitations, together with the common law rights of riparian owners, appear to be the basis for the requirement in §253.12, F. S., as amended by Ch. 57-362, that "lands . . . lying between the ordinary high water line and the bulkhead line, established hereunder, shall be sold only to the upland riparian owner and to no other person, firm or corporation. . . ."

At common law an upland riparian owner had the right to a reasonable use of the water for domestic purposes and the right to the flow of the water without serious interruption and that the same be kept free from pollution (*Ferry Pass Inspectors' and Shippers' Ass'n*, 57 Fla. 399, 48 So. 643). An upland owner is entitled to an unobstructed view of the channel as well as an unobstructed means of egress over the foreshore and tidal waters to the channel and to the main body of the waters (*Hayes v. Bowman*, supra). He also has the right of passage from one side of the navigable body of water to the other, and to cut off this right is a violation of his rights (See *Webb v. Giddens*, Fla., 82 So. 2d 743).

It is stated in 56 Am. Jur. 677 and 678, §216, that "the rule prevailing in most jurisdictions is that the ownership of lands bordering on a navigable stream or body of water, either tidal or nontidal, carries with it, as incidental thereto, the right of access from such land to the navigable channel or portion of such stream or body. This right of the riparian or littoral proprietor is distinguished from that which individual members of the general public enjoy. It is a property right. . . ."

Section 253.12, F. S., requiring that submerged land, "lying between the ordinary high water line and any bulkhead line, established hereunder shall be sold only to the upland riparian owner. . . ." when construed with §§253.06-.15, prior to the 1951 and 1957 amendments, and §271.01, prior to its repeal, as well as the common law rights of riparian owners to a view and access of the channel, lead to the conclusion that an upland owner's rights relate to submerged lands lying between his upland and the channel. The trustees would therefore be authorized in the public interest to sell those submerged lands separated from the upland by a channel to any person. That is to say, the sale would not be made on the preferred basis given an upland riparian owner. The usual procedure followed by the trustees for making such a sale would be upon competitive bids similar to that provided in §270.08, F. S. Of course, such a sale must still comply with the pertinent provisions of Ch. 253, F. S., including advertisement for objections, bulkhead-

ing, and a determination by the trustees that such sale will not be contrary to the public interest.

We must now look to the effect of an artificial channel which has been dug in a portion of the navigable waters included within Ch. 57-362. The navigable waters of Florida include all water capable of practical navigation, whether affected by tides or not, whether the water is navigable in all its parts toward the outside line, or whether the waters are navigable during the entire year or not (*Martin v. Busch*, 93 Fla. 353, 112 So. 274). It includes all submerged lands below the ordinary high water mark on such body of water (*Martin v. Busch*, *supra*; *Tyson v. Gulf, F. & A. R. R. Co.*, 75 Fla. 28, 78 So. 491). The right of navigation through the navigable waters of the state extends over the entire surface of the waters, notwithstanding an increase in the water level by artificial means (65 C. J. S., *Navigable Waters*, §20, p. 89). Although no Florida cases were found dealing with the effect of an artificial channel, a study of the law in other jurisdictions offers an answer to the question presented.

When a channel is a boundary line between states or private lands, an artificial channel has no effect upon the boundary (*White-side v. Norton*, 205 F. 5). The courts have, however, had a different view of an artificial channel when considered for reasons other than boundary disputes. The California courts, in determining the status of an artificial waterway which was man-made, said:

... In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin. . . . (*San Gabriel Valley Country Club v. Los Angeles*, 182 Cal. 392, 188 P. 554, 556, 9 A. L. R. 1200).

In *Cottel v. Berry*, 42 Ore. 593, 72 P. 584, 585, the court said:

It seems to be a rule of law that where owners of different parcels of land conduct water across the same in an artificial channel, and do not define their respective interests in the water, their reciprocal rights thereto are to be measured and determined as if they were riparian owners upon a natural stream (42 Ore. 593, 72 P. 584).

The courts have also held when the opening of an artificial channel is acquiesced in by all on the stream for the period of the statute of limitations the channel becomes fixed (*Hough v. Porter*, 51 Ore. 318, 95 P. 732, 98 P. 1083, 102 P. 728; *Matheson v. Ward*, 24 Wash. 407, 64 P. 520, 85 Am. St. Rep. 955). *Chowchilla Farms v. Martin*, 219 Cal. 1, 25 P. 2d 435, contains a summary of the effect of artificial channels. In this case a portion of the opinion on p. 441, quoted from *Wiel on Water Rights*, Vol. 1, §60, states:

... Where the creator of the artificial condition intended it to be permanent, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. . . .

(See also, *Natural Soda Prod. Co. v. City of Los Angeles*, 132 P. 2d 553.)

In this same respect it is stated in *Corpus Juris Secundum*:

A natural watercourse does not lose its character as such because in its creation it may be aided by the hand of man, or by reason of the fact that a part of its channel has been artificially created, . . . but an artificial watercourse may become a natural watercourse under some circumstances, and by what is said to be the weight of authority that which was at first an artificial channel will become a natural watercourse when for all of the years of the prescriptive period it has taken the place, and served principally in lieu, of a natural channel. . . (93 C. J. S., Waters, §129, p. 841).

While the cases discussed above deal with inland streams and individual rights thereto, I feel the same rule should be applied to tidal waters and artificial channels which the public as well as riparian owners have used for a number of years.

Thus when an artificial channel has existed for a number of years, has been used by riparian owners as well as the general public, has taken unto itself a degree of permanency and affords riparian owners a means of access to the remaining portions of the navigable waters, I feel it establishes the limits of riparian rights. Thus the trustees of the internal improvement fund may sell at competitive bids those submerged lands which are separated from the mainland by artificial channels under the above conditions.

Question 2 is answered accordingly.

059-2—January 9, 1959

**AGRICULTURE AND ANIMAL INDUSTRY**  
**FLORIDA LIVESTOCK BOARD—INSPECTION AND TRANS-**  
**PORTATION OF MEATS IMPORTED FROM FOREIGN**  
**COUNTRY FOR CONSUMPTION IN THE STATE—**  
§585.34(19), F. S.

To: *Halley B. Lewis, Florida Livestock Board, Tallahassee*

**QUESTION:**

Under the provisions of §585.34 (19), F. S., is Florida livestock board authorized to recognize and accept the inspection of an agent of federal bureau of animal industry, and mark such meat passed for sale for consumption within this state without further examination and inspection?

The statute under consideration reads as follows:

It is unlawful to sell any cold storage meat that has been imported into the state from without the United States, herein referred to as foreign cold storage meat, without having first obtained a permit from the board and without having submitted all such meat for inspection and examination at port of entry and paid inspection fee required therefor. The board shall cause all such meat to be inspected upon arrival and shall establish such bacteriological or chemical standards as it deems proper to determine the wholesomeness and fitness of such meat for

human consumption; any meats found unfit for human consumption shall be marked conspicuously with the words "Fla. Inspected and Condemned" and the sale thereof for human food is prohibited. All meats inspected and passed for food, as provided in this subsection, shall be marked with a stamp of such size and design as shall be required by the rules and regulations established by the board for the enforcement of this section, and shall bear the words "foreign cold storage meat inspected and passed." (Emphasis supplied.)

It is the command of the statute that all such meat shall be submitted for inspection and examination at the port of entry and the required inspection fee paid before a permit shall be issued by the board for its entry and sale for human consumption. The statute further provides that all such meat inspected and passed for food shall be marked with a stamp bearing the words "Florida cold storage meat, inspected and passed," and any meat found unfit for human consumption shall be marked with a stamp bearing the words "Florida, Inspected and Condemned."

In the administration of the agency, the board is held to a strict compliance with the commands of the statute. It is required to use such bacteriological or chemical standards as it shall deem proper to determine the wholesomeness and fitness of such meat for human consumption.

You inform me that under the rules and regulations adopted by the federal bureau of animal industry governing the examination of cold storage and frozen meats and meat products used in interstate and foreign products, it is permitted that such examination and inspection be based upon 10% of the quantity of each shipment imported or transported in commerce interstate or foreign, commonly known as a spot check. Such examination or inspection would not satisfy the requirements of the Florida statute, nor is the board authorized by the Florida law to accept such inspection as a substitute for the extent of the inspection required by the statute. It is immaterial that the federal statute and the state statute authorize cooperation between their governmental agencies in the administration of their statutes bearing upon the same or like purposes. Each statute must be interpreted in strict conformity with its respective provisions, as is made clear by decision of federal courts in dealing with situations in which the question presented has arisen.

Chapter 585, F. S., deals only with the sale within this state of cold storage or frozen meats and meat products within the state which is imported into the state from without the United States, and accordingly the rules and regulations of the secretary of agriculture of the United States are not applicable or effective to such meats, which lose the character of interstate and foreign products upon their importation into the state for use and consumption within the state. The state statute has no application to products entering the state in transit to other states or foreign countries. It has been judicially declared that where business activities of wholesale dealers in meats were in part exclusively in intrastate commerce, and part in interstate commerce, statute regulating processed beef offered for sale, which was in conflict with federal regulation covering the same field of activity . . . was valid as to the dealers' activities in intrastate commerce (128 NE 2d, 411). Further in Whipp v. U. S., 47 Fed. 2d 496, it was held that "making



tests to determine existence of communicable diseases in cattle not involved in interstate commerce lies exclusively within the police power of the state" (47 Fed. 2d 496). The question of the validity of state statutes in their application to federal rules and regulations governing the same field of activity has been judicially determined by a comprehensive decision of the supreme court of the United States reported in 187 U. S. p. 137.

As above noted, the statute under discussion was enacted in the exercise of the police power of the state designed to protect and preserve the health and general welfare of the public at large. It is a mandatory statute and is subject to strict construction. Its repeated use of the words "all such meat" clearly establishes the legislative intent, that in order to insure its effectiveness, all such imported meats and meat products shall be subject to inspection.

The use of the word "all" under the principles of law governing statutory construction, has had oft repeated judicial interpretation, among which are, viz:

"All" means every one, or the whole number of particulars, the whole number or substance.

"All" means the entire thing, everything included or concerned, the aggregate, the whole, totality.

The word "all" as an adjective of number means the whole number of, every one of.

The word "all" standing alone means everything that it imports, that is nothing less than all.

"All" means everything and excludes nothing. A more comprehensive and all inclusive word than "all" can hardly be found in the English language; there is a totality about it that few words possess.

The supreme court of the United States in a case on appeal from the judgment of the supreme court of Florida, reported in U. S. Reports 322, p. 607, lays down the rule for the interpretation of the words of a statute when not expressed in complicated technical terms, to be that sense to be attributed to words by the common run of men, and accordingly is to be understood by the ordinary man according to the sense of the thing, as the ordinary man has the right to rely on ordinary words addressed to him. The natural meaning of words cannot be displaced by reference to difficulties encountered in administration.

The Florida livestock board is without authority, by the adoption of rule or regulation, to enlarge or restrict the scope of authority vested in it by the plain words of the statute.

The Florida livestock board is without authority to adopt a rule or regulation of the U. S. commissioner of agriculture governing the inspection of meats and meat products, which are subjects of interstate and foreign commerce, which is contrary to or conflicts with the clear purposes and provisions of the state statute designed to accomplish a like purpose.

The regulations governing the inspection of meats and meat products imported into this state from other states or foreign countries, for a determination of their wholesomeness for human consumption, is solely within the power, and under the control, of the state legislature in the exercise of state police power.

In the adoption, under statutory authority, of rules and regulations governing the administration of state agencies, the governing bodies of such agencies are limited, by the strict provisions of the statute from which their power is derived, to the extent to

which such power or authority may be exercised.

The clear and definite meaning of the language by which the provisions of a statute are pronounced, may not be displaced because of difficulties in administration which may arise or be encountered.

This should answer the questions with which the board is confronted.

059-3—January 9, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS  
BOARD OF ACCOUNTANCY—REINSTATEMENT OF RE-  
VOKED AND CANCELLED CERTIFICATES—§§473.20  
AND 473.04, F. S.**

To: James D. Holley, Chairman, State Board of Accountancy,  
Tallahassee

**QUESTIONS:**

1. If a certificate to practice accountancy is revoked and cancelled under §473.20, F. S., can it be reinstated by the board on the showing of proper qualifications for reinstatement?

2. Is a unanimous vote of the board necessary to revoke or suspend a certificate?

Section 473.20, F. S., relating to grounds and procedure for revoking certificates, provides, among other things:

Any certificate to practice as a certified public accountant or as a public accountant may be *revoked and cancelled or suspended for a definite period, not to exceed two years*, when it shall appear to the board:

A certificate may be revoked or suspended only by the *unanimous vote of all members of the board* for a period not to exceed two years for the violation by the holder thereof of any of the rules or canons of professional ethics promulgated by the board. (Emphasis supplied.)

In construing the above statute it is my opinion that a distinction should be made in the revocation and cancellation of a certificate and in merely the suspension of same, especially in view of the absence of express statutory authority to deal with reinstatement prior to the end of a definite period for which said license was revoked or suspended.

In 70 C. J. S. 912 we find the following:

A person seeking restoration of a license to practice medicine has no greater rights than a person seeking an original license, and under some statutes a person who has had his license *revoked* must commence anew by making an original application for a license. . . . (Emphasis supplied.)

In *West Virginia State Medical Ass'n v. Public Health Council of West Virginia*, 23 S. E. 2d 609, the supreme court of appeals of West Virginia held:

. . . We have found no statutory provision relating to the reinstatement of a revoked license to practice medicine and surgery, . . .

At the time this proceeding was commenced more than eleven years had elapsed since the order revoking Buonanno's license was entered. It has not been vacated,

modified, or successfully challenged during that time. Like other statutory boards there must be a finality to proceedings before the Council. To say otherwise would bring about a state of uncertainty and confusion which would prevent the orderly performance of its duties. We believe the lapse of time alone is sufficient to give the order of revocation finality, and that the Council is precluded from a reconsideration thereof, especially when the proceedings in the Circuit Court of Marion County for review and reversal of the Council's action are taken into consideration. We therefore hold that the license of Buonanno had been finally and completely revoked prior to commencement of this proceeding, and that he now has the same status with respect to the practice of medicine and surgery as if no license had been issued to him. . . . What we have said herein does not preclude Buonanno from obtaining a license by means of another examination held in the manner required by Code, 30-3-4,5.

In *Wright v. Aldridge, et al*, members of the Alabama board of public accountancy, 219 Ala. 632, 123 So. 33, the court held:

The board of public accountancy . . . is of statutory and limited power, and has no powers other than those conferred by statute, the exercise of which can be invoked only in the manner and mode prescribed by statute.

. . . board of public accountancy has no authority either express or implied to reinstate accountant whose certificate has been canceled . . . or to revive and restore to life certificate *so revoked and canceled*; applicant's only remedy being by application for issuance of certificate as provided by statute. (Emphasis supplied.)

In *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 82 A. L. R. 1178, the supreme court of Colorado held:

. . . The complaint against the dentists was made under the provisions of section 4575, C. L. 1921. This section provides, inter alia, for examinations and the granting of dental licenses by the board of examiners. It permits the board to revoke licenses on charges in writing, after due notice and hearing. *The statute declares: "... The board ... shall have the power upon a hearing ... to revoke and annul any license of any dentist ... No person whose license has been revoked, or annulled shall be relicensed within one year thereafter and then only upon sufficient assurance to said board of correct practice in the future and a second revocation or annulment of any license shall be perpetual. ..."* (Emphasis supplied.)

The statute is the sole source of the authority of the dental board and it cannot transcend it. . . .

We believe that the dental board labored under the mistaken assumption that it had no alternative under the statute except to either acquit the dentists, or to annul their licenses. We do not so construe section 4575, C. L. *Since the greater includes the less, the power to revoke permanently includes the power to revoke temporarily, i.e., to suspend. It is to be observed, however, that no suspension can be for more than one year.* We think that the dentists were deprived of the benefit of a consideration of the above reasonable construction of the act as to suspen-

sions when the extreme penalty was inflicted, and that the dental board thereby unintentionally abused its discretion in the premises, to the prejudice of the accused.

For the above reasons, the judgment of the District Court is accordingly modified, to allow the dental board to revise its judgment. . . . (Emphasis supplied.)

In 41 Am. Jur. 187-188, §§63 and 64, we find the following:

**Suspension.**—The power to permanently revoke a license to practice includes power to suspend from practice, and where an examining board finds that a licensed practitioner has been guilty of unprofessional conduct warranting revocation, it is not put to the alternative of either acquitting him or permanently revoking his license but may suspend him from practice for the period permitted by the statute if the circumstances justify such leniency. . . .

**Reinstatement.**— . . . the power to revoke a license includes the power to suspend one, and this necessarily implies a reinstatement in the right to practice at the expiration of the period of *suspension*. (Emphasis supplied.)

Replying to question 1, it is my opinion that when a license or certificate to practice accounting has been revoked and cancelled, the applicant must stand in the same position as a person seeking an original license. However, when a certificate is suspended the board may reinstate same at the end of the definite period for which the license was suspended or it may by a rule and regulation promulgated under the provisions of §473.04, F. S., provide for the reinstatement of same prior to the expiration of the period of suspension.

Question 1 is answered accordingly.

In view of the provisions of §473.20, F. S., question 2 is answered in the affirmative.

059-4—January 12, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
COUNTY AUTHORITY TO FURNISH CONSTABLE EQUIP-  
MENT, SUPPLIES, ETC.**—§§30.23, 37.15, 37.20, 145.01,  
145.02, 145.05, 321.05, Ch. 145, F. S.; §6,  
ART. VIII, STATE CONST.

To: Ben Lindsay, County Attorney, Perry

#### QUESTIONS:

1. Is the board of county commissioners of Taylor county authorized by law to furnish constables with any equipment, supplies, or other items that would be used in the performance of their official duties?

2. In the event that question 1 is answered in the affirmative, would this entail the maintenance of this equipment by the county?

In Florida constables are county officials by virtue of §6, Art. VIII, State Const. They are compensated from the fees of their office as set forth in the laws of the state. (§§30.23 and 37.20, F. S.; see also, §§37.15 and 321.05, F. S.)

Extensive research has failed to reveal any statutory provision authorizing or requiring the boards of county commissioners to supply constables with any equipment, supplies, or



other items that would be used in the performance of their official duties. Such expenses are customarily borne by the constable and paid for out of his fees.

Chapter 145, F. S., deals specifically with the compensation of county fee officers and the disposition of the excess fees of each office. Under that chapter county fee officers are entitled to all the net income of their office, not to exceed \$7500 per year. Net income is defined in §145.02, F. S., as "the residue of income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office." (Emphasis supplied.) As constitutional county fee officers, constables are subject to the provisions of this chapter and their income is, therefore, limited to \$7500 a year after reasonable deductions for necessary expenditures for the proper operation of their office.

All fees in excess of the compensation provided in §145.01, F. S., are required to be paid into the excess fee fund which is to be expended by the board of county commissioners "for the purpose of equipping, maintaining, and supplying said office from which said money is derived with the necessary books, furniture, and all other things now supplied or furnished by the Board of County Commissioners and paid for by them from the general revenue of the county. . . ." (Emphasis supplied.) (Section 145.05, F. S.) This section provides a primary fund from which the board of county commissioners is authorized to supply to the office those things, which prior to the passage of Ch. 145, F. S., were customarily supplied by the board of county commissioners and paid for from the general funds of the county. It does not, in my opinion, authorize the expenditure of the excess fees of a county office for anything that had not been customarily supplied by the board of county commissioners prior to its passage. Even if an excess fee fund should be created as to a constable's office, it appears that the county could not use that fund to purchase anything for the constable which had not been purchased for him in the past from county general revenue funds.

While counties have customarily supplied certain items of substantial office equipment to countywide fee officers, (i.e. tax assessors, tax collectors, sheriffs, etc.) they have not followed this practice as to justices of the peace and constables. It is, therefore, my opinion that the boards of county commissioners are not authorized to expend moneys from either their general revenue funds or the special funds created by Ch. 145, F. S., for the purchase of any equipment, supplies, or other items for the constable even though such items would be used in the performance of his official duties. Such items should be purchased and maintained by the constable from the gross fees of his office.

059-5—January 13, 1959

### CRIMINAL PROCEDURE

#### SUBSCRIPTION AND VERIFICATION OF INFORMATION—

##### ASSISTANT COUNTY PROSECUTING ATTORNEY—

§§906.01(7), 906.04(1); F. S.; §10, D. R., §§10,  
27, 28, ART. V, STATE CONST.

To: *Henry R. Barksdale, County Solicitor, Pensacola*

#### QUESTION:

May an assistant county solicitor of Escambia county sign, verify and file criminal informations in the court of record of said county?

Section 10, Art. V, constitution of Florida, contains the following provisions:

There shall hereafter be elected for a term of four years by the qualified electors of Escambia County, Florida, a prosecuting attorney, who shall be known as "County Solicitor of Escambia County, Florida," and who shall be the prosecuting attorney in the Court of Record in and for Escambia County, Florida, and his duties and compensation shall be fixed by law. An election for County Solicitor shall be held at the general election in 1958, and each four years thereafter, and the person elected at any such election shall take office the first Tuesday after the first Monday in January succeeding the date of the election. Any person now occupying such office or who shall hereafter be appointed to fill any vacancy therein shall continue in office until the election and qualification of a County Solicitor hereunder.

All offenses triable in the Court of Record in and for Escambia County, Florida, shall be prosecuted *upon information under oath, to be filed by the County Solicitor*, but the Grand Jury of the Circuit Court for Escambia County, Florida, may indict for offenses triable in said Court. (Emphasis supplied.)

Section 906.04(1), F. S., reads as follows:

906.04 *Subscription and verification of information.*—

(1) All informations shall be subscribed by the prosecuting attorney, and verified by the oath of the prosecuting attorney.

and §906.01, F. S., provides that in Ch. 906:

(7) The term "prosecuting attorney" includes the prosecuting officer of any court in the state, his assistants, and attorneys appointed by the court to act in the place of the prosecuting attorney.

In *Segars v. State*, 115 So. 537, the supreme court considered the question of whether an assistant county solicitor could sign, swear to and file an information in a criminal court of record in his own name as assistant county solicitor. At that time, §27, Art. V, constitution of Florida, relating to criminal courts of record, provided that:

There shall be for each of said courts a prosecuting attorney, who shall be appointed by the Governor and confirmed by the Senate, and who shall hold his office for four years. His compensation shall be fixed by law.

and §28, Art. V, also relating to criminal courts of record, required that:

All offenses triable in said court shall be prosecuted *upon information under oath, to be filed by the prosecuting attorney. . . .* (Emphasis supplied.)

The supreme court construed said constitutional provisions to mean that only the prosecuting attorney of a criminal court of record, viz., the county solicitor himself, was authorized to make oath to and file an information filed in said court. A statutory provision which purported to authorize an assistant county solicitor to perform these functions was held unconstitutional. The case was reversed because of the trial court's denial of Segars' motion to quash the information and motion in arrest of judgment, both based upon the ground that the information had been signed, sworn to and filed by an assistant county solicitor.

In *State ex rel Ricks v. Davidson*, 163 So. 588, the supreme court dealt with two felony informations filed in the circuit court, one signed by an assistant state attorney in his own name as such assistant state attorney and sworn to by him, and the other signed in the name of the state attorney, "By Dewey A. Dye, Assistant State Attorney," etc., and sworn to by Mr. Dye. The supreme court cited the Segars case, *supra*, with approval in holding that under the following provision of §10 of the declaration of rights of the constitution of Florida:

No person shall be tried for a capital crime unless on presentment or indictment by a grand jury, and no person shall be tried for other felony unless on presentment or indictment by a grand jury or upon information under oath filed by the prosecuting attorney of the court wherein the information is filed, except as is otherwise provided in this Constitution. (Emphasis supplied.)

only the state attorney could make oath to and file felony informations, and that the felony informations under consideration were null, void and of no effect.

Upon the authority of the above cited cases, I think that only the county solicitor of Escambia county may sign, swear to and file informations in the court of record of that county, whether they be for felonies or for misdemeanors; and that §§906.04(1) and 906.01 cannot be constitutionally construed to authorize an assistant county solicitor to perform these functions.

Therefore, it is my opinion that your question is properly answered in the negative.

059-6—January 15, 1959

Supplementing 058-336

#### DENTISTRY

DENTIST—PRIVATE PRACTICE OF MEDICAL ANESTHESIA

—CHS. 458 AND 466, AND §§205.051, 456.02 (1), (2), 456.04, 464.021 (2), AND 466.09 (1) - (3), F. S.

To: Edward S. Resnick, Attorney, Miami Beach

#### QUESTION:

May a dentist licensed to practice in Florida and who has completed satisfactorily a qualified residence in anesthesiology, including all phases of medical anesthesia in a university hospital, engage in the private

practice of medical anesthesia without being licensed by the state board of medical examiners?

I would like to make the following comment relative to the fifth paragraph of your letter on p. 1 which I quote:

I realize that the law is not governed by medical doctors; however, I would like to bring your attention to the fact that Dr. Homer L. Pearson, who requested the Opinion from you, and who is the Secretary-Treasurer of the State Board of Medical Examiners, advises us that, in his opinion, a Dentist duly licensed to practice in the State of Florida, and who has satisfactorily qualified by taking advance courses in Anesthesiology, is authorized in this State to give anesthesia for all types of surgery.

This office received a letter dated Nov. 14, 1958, from Dr. S. H. Axelrod, director of the department of anesthesiology, Mount Sinai hospital, 4300 Alton Road, Miami Beach, requesting my opinion on substantially the same question as answered in opinion 058-336. I advised Dr. Axelrod in a letter dated Nov. 17, 1958, that this office was not permitted to render official opinions except to certain public officials respecting their official duties, and, therefore, I was referring his letter to Dr. Homer L. Pearson, secretary-treasurer of the Florida state board of medical examiners, with the request that he advise him relative to the opinion of the said board and its jurisdiction over the matter.

Dr. Pearson did not exercise the administrative jurisdiction of the board in making a departmental or administrative interpretation of the matter; instead he referred the question to this office for a ruling. If, as you advise, Dr. Pearson gave you the opinion set forth in your letter and quoted above, I am at a loss as to why he requested an official opinion from this office.

We did not hastily arrive at our opinion. Only a few of the applicable cases and law were referred to in the opinion in the interest of brevity. However, in this letter I am setting forth in greater detail the additional law and authorities which should convince you that our opinion is the correct one.

Section 456.02(1), (2), F. S., provides:

(1) The term, "basic sciences," means the following subjects: anatomy; physiology; chemistry; pathology; bacteriology.

(2) The healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

Section 456.04, F. S., relating to certificates in the basic sciences, which are prerequisite qualifications for examination to practice the healing art, provides:

This chapter shall not be construed as applying to dentists, pharmacists, nurses, optometrists, chiroprodists and Christian Scientists practicing within the limits of their respective callings; nor to persons licensed to practice the healing art or any branch thereof in the state on September 10, 1939, nor to persons specifically permitted by law to practice without licenses who practice each within the limits of the privileges thus granted them. (Emphasis supplied.)

Section 466.09(1)-(3), relating to the practice of dentistry, provides:

(1) License—The grant of authority by the board to any person to engage in the *practice of dentistry or dental hygiene*. Such license shall be a privilege personal to the licensee, and may be revoked or suspended by the board for violation of any of the provisions of this chapter.

(2) License certificate—The documentary evidence under seal of the board that said board has granted authority to the licensee to *practice dentistry or dental hygiene* in this state.

(3) Renewal certificate—The documentary evidence that the board has renewed the authority of the licensee to *practice dentistry or dental hygiene* in this state subject to such conditions as may be provided by this chapter. (Emphasis supplied.)

Section 205.051, F. S., provides for an occupational license for all persons practicing medicine "*or any one of its branches*." This section also provides that such persons shall produce a certificate of qualification as established by certificate or license from one of the state boards duly constituted and authorized to determine such qualifications and competency.

See also A. G. O. 056-10 where it was held that the provisions of §205.051, F. S., *prohibit the issuance of an occupational license to any person "to practice medicine in any of its branches unless and until proof of current qualification and competency, as established by certificate or license issued by state boards duly constituted and legally authorized to determine qualification and competency, be exhibited at the time of making such application."* (Emphasis supplied.)

This brings us to the question of whether the *practice of medical anesthesia* comes within the practice of medicine in one or more of its branches. If the practice of medical anesthesia comes within the practice of medicine in any of its branches, then §205.051, F. S., is applicable and the required proof of qualification and competency must be exhibited to the tax collector before an occupational license may be issued, but if not then no such proof is required.

The term "practice of medicine in any of its branches," as used in §205.051, F. S., is not defined, and it therefore is necessary that said section be construed in the light of law and legal principles.

The first attempt to regulate the practice of medicine in this state seems to have been an act of Feb. 10, 1831, which statute, although meager in detail, remained in force until the adoption of Ch. 3881, 1889. These statutes appear to have regulated the practice of all schools of medicine in this state. From time to time since 1889 separate regulation has been provided for the different schools of medicine until now separate regulation is provided for osteopaths (Ch. 459, F. S.), chiropractors (Ch. 460, F. S.), chiroprodists (Ch. 461, F. S.), naturopaths (Ch. 462, F. S.), optometrists (Ch. 463, F. S.), and dentists (Ch. 466, F. S.), in addition to Ch. 458, F. S., which regulates all fields of the practice of medicine not embraced in some other specific statute. The statutes regulating the practice of midwifery (Ch. 485, F. S.), nurses (Ch. 464, F. S.), physical therapists (Ch. 486, F. S.) and psychologists (Ch. 490, F. S.) may also relate to branches of the practice of medicine.



The history of the said statutes indicates that Ch. 458, F. S., relates generally to the practice of medicine, and that the other statutes above mentioned relate to specific fields of the practice of medicine. It might be said that those practicing under Ch. 458, F. S., are general practitioners and those practicing under other statutes are limited practitioners.

Herzog in his Medical Jurisprudence, p. 89, §112, defines limited practitioners of medicine as "those licensed to practice one or more branches of medicine or surgery, or some special system or method of treating disease."

A. G. O. 056-10 construes said §205.051, F. S., as prohibiting issuance of an occupational license to any person to practice medicine in any of its branches until proof of current qualification and competency, as established by certificate or license, is exhibited and holds that the practice of physical therapy is within definition of practice of medicine in one of its branches. (See also F. S. A. Vol. 10A, history notes on p. 135.)

In view of the fact that on page 3 of your letter you compare the practice of hypnotism with the drug type anesthetic, I call your attention to my opinion 056-12, relating to the practice of psychosomatic therapy and *medical hypnosis* as constituting the practice of medicine, which reads in part as follows:

When consideration is given to the above definitions of "psychosomatic," "psychotherapy," "therapy," "medical," and "hypnosis," we must conclude that "psychosomatic therapy" and "*medical hypnosis*" may be used in the treatment of human disease, pain, injury, or physical condition and when so used are within the definition of the practice of medicine as contained in §458.13(1), F. S., as amended by Ch. 29867, 1955. Therefore, to constitute the practice of medicine, any such service or practice must be clearly designated as treatment of human disease, pain, injury or physical condition.

Accordingly, where "psychosomatic therapy" and "*medical hypnosis*" treatment is applied for the purpose of attempting to cure a specific disease or ailment, it is our opinion that such treatment constitutes either the practice of medicine, or one of the branches of the healing arts exempted from the requirements of the medical practice act, but regulated by some other act or board. However, it must be remembered that some of these practices are not applied for treatment of human disease or ailment. By law or custom these practices are not prohibited.

Those charged with the enforcement of this state's medical practice act are authorized to prevent unlicensed medical practice of "psychosomatic therapy" and "*medical hypnosis*" where such treatment invades the field of medical practice. However, discretion should be used to avoid attempting to prohibit practices which may not be considered an invasion of the medical profession. (Emphasis supplied.)

In State v. Borah, 51 Arizona 318, 76 Pac. 2d 757, also 115 A. L. R. 254, the supreme court of Arizona held:

The right of a citizen to practice medicine is subject to the paramount power of the state to impose such regulations, within the limitations of the Constitution as may

be required to protect the people against ignorance, incapacity, deception or fraud in the practice of that profession.

In the proper exercise of the police power, therefore, the Legislature may control and regulate the practice of medicine in all of its branches, subject only to the rule that these regulations must be reasonable and bear some relation to the end or object to be attained, which is to protect the public from being mistreated or misled by incompetent or unscrupulous practitioners. *State v. Armstrong*, 38 Idaho 493, 225 P. 491, 33 A. L. R. 835. It has, therefore, for many years been the custom of the legislative authority of the different states to regulate, to a greater or less extent, the practice of medicine. Most of the original acts dealt only with the general subject and the licensing of a physician under such act usually permitted him to treat any ill to which the human body was subject, from an ingrowing toenail to Asiatic cholera, from an aching tooth to an astigmatic eye, and many of our older citizens can remember when the general practitioner, especially in the more remote country districts, did at times exercise all these, as well as many other forms of the healing art. *With the development of medical science, especially in modern times, it was realized that it was beyond the limits of the human brain to know thoroughly and completely every portion of medical science available, and physicians began to specialize in various branches of the profession. Probably the first division was between the physician proper, who specialized in the administration of drugs of various kinds, and the surgeon, who devoted his skill to operative relief. Dentistry and ophthalmology were among the next fields for specializing, and the list has now been extended almost ad infinitum. Legislative control of these various branches of the medical profession also began to specialize and under the more modern medical acts, many examinations are provided which, if successfully passed, limit the applicant to the practice of some particular branch of medicine. But all times, and no matter how the language of the acts changed, the ultimate purpose was the same, to wit, to protect the health of the public by excluding from the practice of medicine those who had not shown themselves competent therefor. In determining, therefore, whether or not a regulation of the practice of medicine in any of its branches is a reasonable one, and thus within the power of the Legislature to enact, the test must always be whether or not it is reasonably necessary and appropriate for the protection of the public health. (Emphasis supplied.)*

It is to be noted that *the Arizona law is similar to Ch. 466, F. S., relating to the practice of dentistry, in the following respects:*

(1) A person shall be deemed to be practicing dentistry who administers an anesthetic of any nature in connection with a dental operation.

(2) That a registered nurse may administer anesthetics under the direct direction of a licensed dentist.

In *State v. Borah*, supra, the court further said:

The specific question which is before us then is, wheth-

er a dentist, duly licensed to practice his profession in the state of Arizona, is, within the meaning of §2569, supra, a "licensed physician or surgeon," or whether for the purposes of said section, these words are confined to their ordinary meaning of one who is licensed to practice the medical art in general, without being limited by his license to the practice of dentistry, as defined in the act of 1935. (Arizona Statute) It will be noted that by that act a dentist is, for the first time, expressly authorized, so far as the treatment of the teeth, gums, jaws, oral cavities or tissues adjacent thereto, to "perform an operation or administer an anesthetic in connection therewith." Before the passage of this act there was grave doubt whether under the law a licensed dentist could legally administer an anesthetic himself and it was the general practice, when such a thing was necessary, to call in a regular physician to administer the anesthetic. It is claimed by plaintiff that one of the reasons for giving this power to dentists was the recognition by the Legislature that such treatment was proper and necessary adjunct to dental surgery; that all dentists who had been properly educated were, as a matter of fact, as carefully trained in the administration of anesthetics as were physicians, and that it was unfair to require them to seek the assistance of members of another branch of the profession to do something which they were equally well qualified to do themselves. We think there can be no doubt that the reason for the express inclusion, in the 1935 act, of the administration of anesthetics in the course of dental surgery as one of the things which a dentist was expected and permitted to do as a part of the regular practice of his profession, was to remove any possible question as to his right to do so. Under the definition of the statute of 1935, (Arizona Statute) therefore, dentists, or, as they are sometimes called, dental surgeons, were expressly authorized by the law to administer anesthetics in all cases of dentistry which might require such practice as much as were licensed physicians and surgeons. There can be no question that if plaintiff himself, or any other licensed dentist, desired to administer an anesthetic to a patient, as part of dental practice, they would be fully within their rights under the law. Nor is this questioned. The objection which is made is that, while he may do this himself, he may not permit a registered nurse to do it under his direction and in his immediate presence.

In determining this question we must first look to the specific language of the law, and if this language is plain and unambiguous, and on its face susceptible of but one construction, we may not go beyond it. . . . If, on the other hand, the statute under consideration, either standing alone or taken in connection with other statutes in pari materia, is ambiguous and susceptible of two meanings, and if one of those meanings would either lead to an absurdity or render the statute unconstitutional, while the other meaning would be logical and consistent with the general policy of the law and in conformity with the provisions of the constitution, we must necessarily adopt



the latter construction, for a construction which makes a statute constitutional is to be given rather than one which would compel us to hold it unconstitutional. . . . If the limited meaning originally given by the Legislature to the words "physician and surgeon" is to be applied to these words as they appear in section 2569, supra, (Arizona law) *plaintiff is not, within such meaning, a physician and surgeon, and, therefore, may not use a registered nurse to administer an anesthetic. But the Legislature has by the act of 1935 (Arizona statute) expressly given him the right personally to administer such treatment. Necessarily by so doing, they have determined that a licensed dentist is fully qualified to administer an anesthetic in dental operations, . . .*

We hold, therefore, that since the enactment of the act of 1935, the word "surgeon" in section 2569, supra, (Arizona law) "was meant by the legislature to include licensed *"dental surgeons,"* and that registered nurses, qualified under such section, may administer anesthetics under the direction of and in the immediate presence of a licensed dental surgeon *for the purpose of assisting in any of the operations which such surgeon is authorized to perform.* (Emphasis supplied.)

Section 464.021, F. S., relating to the practice of nursing, defines the practice of professional nursing as follows:

(2) "Practice of professional nursing."—For the purposes of this chapter the phrase "*practice of professional nursing*" shall mean the performance of any nursing services or acts requiring the observation, care and counsel of the ill, injured or infirm, or in the maintenance of health or prevention of illness of others, or in the supervision and teaching of other personnel, *or the administration of medications and treatments as prescribed by a licensed physician or dentist;* requiring substantial specialized judgment and skill and based on knowledge and application of the principles of biological, physical and social science. (Emphasis supplied.)

In *Frank v. South*, 175 Ky. 416, 194 S. W. 375 and *Chalmers-Francis v. Nelson*, 6 Cal. 2d 402, 57 P. 2d 1312, I find the supreme courts of Kentucky and California, the respective states in each of these cases, have rendered an opinion to the effect that a nurse may administer anesthetics *when administered under the immediate direction and supervision of the operating surgeon and it would not constitute the practice of medicine.*

In a later case, *State v. Catellier*, 63 Wyoming 123, 179 Pac. 2d 203, involving the administration of anesthetics intravenously by a chiropodist from which the patient died, it was held that such administration of anesthetics was in a great many instances dangerous to the patient; *and when administered by the chiropodist "as an independent enterprise,"* it constituted the practice of medicine. I might add that the Wyoming statute thus interpreted by the court is very similar to Ch. 458, F. S., relating to the practice of medicine. (See A. G. O. 047-424.)

*Frank v. South*, supra, states, among other things, as follows:

*The practice of surgery is one method of the "practice of medicine" and consists of an attempt to cure or alleviate a bodily infirmity or ailment by surgical means, that is, to*

treat the ailment or infirmity by applying manual operations or instrumental appliances, or by the use of the surgical knife. To enable the patient to bear the operation with a greater degree of safety and to recover from the effects of it more surely and rapidly, oftentimes his general physical condition is improved by the administration of medicines beforehand; he is bathed and certain portions of the body specially sterilized to prevent infection of any kind, and *anesthetics administered to deaden the pain of the operation.* The duties are performed by assistants selected by the surgeons, and *who perform them under his direction and supervision, and when performed by them, as directed, without diagnosis of the disease or prescribing the remedy, or the medicines to be used, or making use of the surgical means to cure or alleviate the disease,* but only act as the hands of the surgeon, have never, in the popular sense, been considered as practicing surgery, or treating a disease or ailment by surgical means (*Beile v. Travelers' Protective Association*, 155 Mo. App. 629, 135 S. W. 497).

It is the duty of the surgeon who would undertake a surgical operation to make a diagnosis of the symptoms of the patient to determine his ailment and the remedy necessary, and, *if he determines that an anesthetic is necessary for the performance of the operation, to determine what anesthetic is necessary and the manner of its administration, and to give the necessary directions for so doing and to supervise and direct its giving, and in the selection of an assistant to administer the anesthetic he should exercise the same degree of knowledge, skill, and care as he is required by law to exercise in the performance of any part of the operation.* (Emphasis supplied.)

In view of the foregoing construction placed upon the Arizona law, which is very similar to the Florida law in the pertinent respects, there can be no doubt about a licensed dentist in Florida being allowed to administer an anesthetic or to allow same to be administered by a registered nurse under his direction in *connection with the practice of dentistry.*

It is, however, my opinion that the administration of anesthetics by a registered nurse or a licensed dentist "*as a separate and independent enterprise*" would constitute the practice of medicine in one of its branches under the law of this state; that one desiring to follow the particular calling designated as a medical anesthetist, *even if not specifically regulated by laws of this state or by any board specifically created and authorized to license same,* must secure the necessary occupational license for the privilege of practicing such profession; that before being entitled to receive such license to practice medical anesthesia as an "*independent enterprise*" he must present to the tax collector a certificate of proficiency from a board duly constituted to determine such qualifications in compliance with §205.051, and since there is no board created to issue same, it would be legally impossible to obtain such an occupational license.

It is further my opinion that no amount of hospital training or education in anesthesiology would cure the "*legal disability*" of a licensed dentist to administer anesthetics "*as an independent enterprise.*" However, it may be that a qualified dentist, as well as

a registered nurse, *might administer anesthetics under the direct supervision, direction and control of a registered and licensed physician as an employee or assistant to said physician.* However, it must be borne in mind that under the rule of respondeat superior, the physician or operating surgeon would be personally responsible for acts of negligence on the part of the dentist who is administering the anesthetic under his direction and supervision.

In the final analysis I cannot agree that a dentist or anyone not licensed under Ch. 458, F. S., may engage in *the private practice of medical anesthesia.* This professional designation opens up conjecture that such a practitioner might venture beyond the usual giving of anesthesia under the direction and supervision of a licensed physician and proceed on his own to diagnose and profess to administer pain reducing and relieving anesthetics.

If, on the other hand, a dentist wishes to serve as an employee of a physician to administer anesthesia, similar to that given by a physician's nurse under his supervision and direction, he may do so; provided each physician is willing to accept the legal responsibility for his acts. However, he may not hold himself out as an independent practitioner in a new healing art; viz, medical anesthesia, because he is capable and licensed as a dentist to administer anesthesia only for dental purposes does not *legally* qualify him for administering general anesthesia.

In view of the fact that I intend this to be a supplement to my opinion 058-336, I am sending a copy of same to Dr. Homer L. Pearson, as well as others who have requested a copy of said opinion.

059-7—January 15, 1959

#### PROBATE LAW

FOREIGN DECEDENTS—BANK ACCOUNTS WITHIN THE  
STATE—LIEN FOR UNPAID TAXES—CHS. 198, 199 AND  
§§198.08, 198.22, 198.23, 199.03, 199.22, 659.48, 732.35,  
732.36, AND 734.30, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Should a banking institution in this state turn over deposits of decedents to foreign personal representatives under §734.30, F. S., when no administration of the estate was commenced in this state within the three months mentioned in the said statute?**

The Florida Statutes (§§732.35 and 732.36) contemplate that the primary administration of estates of decedents who are residents of this state shall be in the courts of this state. By §734.30 (4), F. S., "all persons indebted to the estate of a decedent or having possession of personal property, either tangible or intangible, belonging to the estate of a decedent, who have received no written demand from a personal representative or curator appointed in this state, for payment of such indebtedness or the delivery of such property, are authorized to make payment of such indebtedness or to deliver such personal property to the foreign personal representative after the expiration of three months from the date of his appointment." The above statute may have no application to the State of Florida, either as a limitation (Heidt v. Caldwell, et al., Fla., 41 So. 2d 303, text 305) or

generally as a statute (82 C. J. S. 554-558, §317).

If the decedent's estate should be within the purview of §198.22, F. S., Florida inheritance taxes would, "unless sooner paid, be a lien for 10 years upon the gross estate of the decedent. . . ." This lien appears to run from the time of the death of the decedent, whether within or without this state in so far as there may be any liability to this state of the decedent's estate for inheritance and estate taxes, and continues until the tax has been paid (*Henderson v. Usher*, 125 Fla. 709, 170 So. 846). "If the Commissioner is satisfied that no tax liability exists, or that the tax liability of an estate has been fully discharged or provided for, he may issue a waiver releasing any and all property of such estate from the lien herein imposed" (§198.22, F. S.). An administrator or executor in this state making distribution of the estate without protecting the state's lien under said §198.22 is personally liable to the state (§198.23, F. S.). We find nothing in the Florida Statutes, or the session laws from which derived, indicating an intention on the part of the legislature that said §734.30, F. S., should be prior or superior to the lien of the state for inheritance taxes aforesaid, or that the three-month limitation contained in said §734.30 should be applicable to the state.

In this same connection we deem it proper to call your attention also to §199.22, F. S., which provides that "all intangible personal property taxes shall be a lien on all the real and personal property of the taxpayer in the county in which they are assessed from the time they become due." This lien is given a life of seven years and is made, "superior to all other liens, except liens for other taxes, state, county and municipal, and prior recorded liens on real estate." It seems reasonable to believe that bank accounts might well be liable to the lien of this statute, in so far as the estates of decedents are concerned. The above comments relative to §734.30, F. S., and the lien of inheritance and estate taxes also seem applicable here. Although §734.30 seems applicable to ordinary creditors of the decedent's estate, as well as general claimants against the property of the decedent, we doubt that its applicability extends to the state itself.

If §734.30, as well as §659.48, F. S., be construed as being prior and superior to the liens of estate and inheritance taxes, as well as intangible personal property taxes, so that bank accounts and other property may be released to foreign personal representatives (who are not also ancillary representatives in this state), then such procedure might be used to defeat the state's lien against such bank account for inheritance and estate taxes as well as intangible personal property taxes. We do not think that the Florida legislature ever intended such a construction.

The lien under §198.22 is upon the "gross estate of the decedent." Doubtless the decedent's bank accounts are to be considered in determining the taxable estate of the decedent under Ch. 198, F. S. It means the entire property subject to the tax; bank accounts are to be included in the gross estate of the decedent when calculating the tax to be imposed (see *Detroit Bank v. United States*, 317 U. S. 329, text 332-333, 63 S. Ct. 297, 87 L. ed. 304, text 308-309). Bank accounts of taxpayers are subject to distraint generally (47 C. J. S. 1033 and 1035, §§788 and 790).

Where a bank account of a decedent is paid to a personal representative appointed by a probate court in this state (either original or ancillary) the fund derived from such account remains as



property subject to the satisfaction of the tax lien; however, its payment to a foreign personal representative subject only to the direction of a court of another state may well place the said fund beyond the control of the state and result in the defeat of the payment of the tax. Although it may well be argued that a bank, under the circumstances mentioned in the above stated question, might be liable to the state in the amount of the tax lien or the amount of the bank account paid over pursuant to §734.30, whichever was the lesser; nevertheless, the answer is not clear in the absence of some rule or regulation constituting notice to the bank that the state holds or may hold a lien thereon.

Under the provisions of §198.08, F. S., "the commissioner may from time to time make such rules and regulations, not inconsistent with this chapter, as he may deem necessary to enforce its provisions. . . ." Section 199.03 is similar in purport. It might well be deemed necessary for the proper enforcement of both chapters 198 and 199, F. S., that rules and regulations be made and adopted designed to protect the state's interest through tax liens in bank accounts subject to payment to foreign personal representatives under circumstances which might well have the effect of a loss of the state's lien in this connection.

These suggestions constitute our answer to the above stated question.

059-8—January 15, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—TEACHERS STARTING AFTER AGE  
SIXTY—CHS. 122, AND 238, AND §§122.04, 122.18,  
238.05 AND 238.07, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTIONS:**

1. May a person starting teaching in the public schools of this state after age 60 become a member of the state and county officers and employees retirement system?

2. If the above question is answered in the affirmative, is membership in the said state and county retirement system compulsory?

The state and county retirement system (Ch. 122, F. S.) is, by §122.04, F. S., "compulsory as to all persons who enter the employment of the state or county of the state on or after July 1, 1947," unless such person also be a member of one of the retirement systems mentioned in §122.18, F. S., including "members of the teachers' retirement system" (Ch. 238, F. S.).

Although we find nothing in the statutes expressly denying membership in the teachers' retirement system to teachers who enter the public school system of this state after reaching the age of 60 years (see §238.05, F. S.), it is to be noted that §238.07, F. S., provides that "any member who attains seventy years of age shall be retired forthwith" under one of the plans of retirement contained in said section. "Any member who retires on or after July 1, 1954, who at the time of his retirement has not served as a teacher in Florida for ten years shall not be eligible to receive and shall not be paid any service retirement allowance." (§238.07(14), F. S.). This office in opinions of July 19, 1947 (047-210), Oct. 14,



1947 (047-406), June 6, 1950 (050-271) and June 7, 1952 (052-196) appears to have construed said provision in §238.05 as requiring retirement from teaching at age 70 as to members of the retirement system.

When a person enters the public school system of this state as a teacher at an age where it is readily apparent that he will be unable to acquire the required service of 10 years in order to be eligible for retirement at the compulsory age of 70 there would be little, if any, reason for enrolling him as a member of the teachers' retirement system. We, therefore, hold that such a teacher does not and may not become a member of the said teachers' retirement system of this state. Such a teacher, not being a member of the teachers' retirement system or any other retirement system within the purview of §122.18, F. S., is not exempted by said section from the state and county officers and employees retirement system and must, under the terms of §122.04, F. S., become a member of said retirement system.

We, therefore, hold that both questions above stated must be answered in the affirmative.

059-9—January 15, 1959

#### TAXATION

VOID TAX DEEDS—RIGHT TO REFUND OF TAX WHEN  
DOUBLE ASSESSMENT—§§193.40 AND 194.28, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Where the tax sale certificate upon which a tax deed was predicated was invalid because of a double assessment of the property, may the tax deed holder obtain a refund of the amount paid for the said tax certificate and subsequent taxes upon which such deed was based?

2. May the said tax deed holder obtain a refund of taxes paid by him subsequent to the issuance of the tax deed?

3. If a refund is to be made, pursuant to either of the above questions, from what fund should it be made?

"The imposition of an ad valorem tax *twice* against the same person or property for the same purposes because of such ownership would be double taxation in violation of law, but both impositions must be taxes as distinguished from other impositions." (Klemm v. Davenport, 100 Fla. 627, 129 So. 904, text 907, 70 A. L. R. 156). Unless duly authorized double taxation is unauthorized (84 C. J. S. 131, et seq., §39, et seq.), and if one be paid the other becomes an invalid tax. A tax sale certificate, although issued pursuant to a double taxation, is invalid and not sufficient basis for a tax deed where one of the assessments has been paid. Where the second assessment is paid, or the tax sale certificate predicated thereon, is purchased, there is the payment of a tax when no tax was due.

Under §193.40, F. S., a refund of taxes may be made, in the manner therein provided, in case of a "payment where no tax was due." The double taxation here involved, if there had been a payment of one of the assessments prior to the purchase of the tax sale certificate and issuance of the tax deed, would seem to be within the purpose and purview of said §193.40, and a refund there-

under may be made upon proper and sufficient proof of the double assessment and the purchase of the tax certificate in question. The refund should be made as provided in and by said §193.40. Section 194.28, F. S., also has some bearing upon the first question and should be taken into consideration in that connection. This section seems to require that the tax deed owner make, execute and deliver "a deed of release of his rights" under his tax deed; this doubtless was intended as a method of clearing the title of the landowner whose title may have been clouded by the issuance of the tax deed. The grantee of this deed is not fixed by the statute; however, as it is the title of the landowner which is clouded, and not that of the state, we feel that such deed should run to the landowner whose title has been clouded as grantee. These observations seem to answer question 1.

Although it may be the primary duty of the landowner to pay taxes on his real property (84 C. J. S. 1220, §609) payments by strangers or mere volunteers, including persons without any legal interest in the property taxed, cannot usually be made the basis of claims for refunds, either against the taxing authority or the landowner (84 C. J. S. 1223, §610). However, if the double assessment of the lands was continued so that taxes were paid twice on the same lands, then payments by other than the landowner might be within §193.40, F. S., and where the circumstances permitted refunds might be made. These observations answer question 2, as well as it may be answered upon the record before us.

Sections 193.40 and 194.28, F. S., point out the manner of payment and the source of the funds for payment of tax refunds thereunder. These sections answer question 3 or furnish the predicate for its answer.

059-10—January 15, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—CONSTRUCTION OF §§122.02(4) (a)  
AND 122.03(2), F. S.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

What service credits is a county employee entitled to who was, from Dec. 17, 1938 to Jan. 1, 1942, employed by the Florida state employment service, from Jan. 1, 1942 to April 5, 1946, with the U. S. employment service (the service having been transferred from state to federal control), having resigned from the federal employment of said April 5, 1946, but who returned to county employment on September 1, 1948, and has continued and still is so employed?

Under §122.03(2), F. S., "Any officer or employee who held office or was employed by the state or a county of the state on July 1, 1945, or October 1, 1950, and has been holding office or has been continuously employed from April 1, 1955:

(a) May receive credit for prior services rendered subsequent to 1945;

(b) Credit for services rendered prior to July 1, 1945, shall be continuous except that one period of absence not more than five years shall be allowed, and in computing

such service credit, the period of absence shall not be creditable service;

(c) Provided any person receiving prior service credit under (a) and (b) pays into the retirement fund the amount he would have paid had he been a member since July 1, 1945. . . ."

There was no five-year break in the employee's service, mentioned in the question, of more than five years between Dec. 17, 1938 and Jan. 1, 1942. This seems to put in issue the question of credit for the federal service between Jan. 1, 1942 and April 5, 1946, the date of his separation from the federal service.

This brings us to a consideration of §122.02(4)(a), F. S., which, in so far as here material, provides that,

In determining the aggregate number of years of service of any officer or employee the time of military service between 1939 and 1946 by the employee on leave of absence shall be added to the years of state or county service. Credit for any other military service shall not exceed four years; provided that those individuals who were employed by the war manpower commission in Florida (or on military leave from the war manpower commission) prior to November 16, 1946, by the national reemployment service in Florida subsequent to June 30, 1933, the Florida state employment service subsequent to June 30, 1935, or in the readjustment allowance or employment service departments of the veterans administration in Florida between July 1, 1944 and January 1, 1950, and who continued in employment with the state or any county without interruption in the performance of services, shall be entitled to credit for continuous service for all such employment with the named agency or department, and shall have such time added to their aggregate number of years of service;. . . . (Emphasis supplied.)

Between July 1, 1955 and July 1, 1957 (prior to amendment by chapter 57-813,) said paragraph, in so far as here material, provided that,

In determining the aggregate number of years of service of any officer or employee the time of military service between 1939 and 1946 by the employee on leave of absence shall be added to the years of state or county service. Credit for any other military service on leave of absence shall not exceed four years. Provided that those individuals who were in the employ of war manpower commission (or on military leave therefrom) on or before November 16, 1946, and who were on or before that date transferred to the employ of the Florida industrial commission, individually or in groups, shall be entitled to credit for continuous service from the date of the commencement of such federal civilian employment in Florida offices of the war manpower commission, and shall have such time added to their aggregate number of years of service. . . .

An examination of the above quoted provisions of §122.02, F. S., as derived from the 1955 enactment, reveals that, in addition to members of the armed forces of the federal government, only "those individuals who were in the employ of the war manpower commission (or on military leave therefrom) on or before Nov. 16, 1946, and who were on or before that date transferred to

the employ of the Florida industrial commission," may receive credit for federal service. The person mentioned in the above question, although in the employ of the war manpower commission before Nov. 16, 1946, was never transferred back to the employ of the Florida industrial commission, in that he resigned from such federal employment on April 5, 1946, and was never transferred back to state employment by the federal government.

Likewise, an examination of the above quoted provisions of §122.02, F. S., as derived from the 1957 enactment, reveals that the provision for credit for federal service was extended so as to include, not merely the employees of the war manpower commission, above mentioned, but also other types of federal employees, which the employees mentioned "continued in employment with the state or any county without interruption in the performance of services," after being returned to state employment or after their federal jobs were abolished and the duties thereunder passed back to the states. The person mentioned in the above question *did not*, after separation from federal employment, return to and "continue in employment with the state or any county without interruption in the performance of services," as required by the statute.

The evident purpose of the above quoted provision in §122.02, F. S., both the 1955 and 1957 enactments, was to preserve to those state employees whose employment passed from the state to the federal government, in the manner and at the times mentioned, and was later returned to the states by the federal government, their services with the federal government, which employment was primarily for local or state purposes, so that they would lose no service credit, so long as their services comply with the requirements of such enactments. Among these requirements was that they be transferred back to the employment of the state or a county, under the 1955 enactment, or that they "continued in employment with the state or any county without interruption in the performance of services," under the 1957 enactment. The person mentioned in the above question fails to meet either of these requirements. Subsection (2) of §122.03 relates to state and county service and not to the federal services which are provided for in above quoted provisions from §122.02.

Under the facts and circumstances set out in the above question, the person therein mentioned would, upon complying with the requirements of §122.03, be entitled to service credit for his state employment from Dec. 17, 1938 to Jan. 1, 1942, when he transferred to federal service. His federal service, because of the above observations, not being within either §122.02 or §122.03, no credit may be given him for services with the federal government from Jan. 1, 1942 to April 5, 1946, the date of his leaving the federal employment, a date prior to the return of the employment to the state. He is entitled to service credit from Sept. 1, 1948 to his separation from county or state service.



059-11—January 21, 1959

**TAXATION**  
**DOCUMENTARY STAMP TAX—RENEWAL OF EXISTING**  
**PROMISSORY NOTE, EXEMPTION—§§201.08**  
**AND 201.09, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

**Does an increase of the interest rate in a note extending or renewing an existing one take it out of the purview of §201.09, F. S.?**

Said §201.09, F. S., in so far as here material, provides that "when any promissory note is given in renewal of any existing promissory note, which said renewal note *only extends or continues the identical contractual obligation* of the original promissory note and evidences part or all of the original indebtedness evidenced thereby, not including any accumulated interest thereon and *without enlargement in any way of said original contract and obligation*," such renewal note shall not be subject to taxation under §201.09, F. S. A renewal note involves a new contract by the maker or obligor, and, except for this section, would be taxable under §201.08, F. S.

Generally, a renewal note is not to be construed as extinguishing the one renewed, in the absence of an agreement to that effect (4 Fla. Jur. 508, §207), and the original indebtedness is a sufficient consideration for the renewal note, especially where the renewal was made prior to maturity of the one renewed (4 Fla. Jur. 400, §74). Some authorities hold that a matured note is an insufficient consideration for a renewal note (10 C. J. S. 633 and 634, §160). To constitute a consideration for a renewal note there must be involved an agreement to do something the debtor "is not already legally bound to do." (10 C. J. S. 635, §160, note 50). It has been held that an agreement to pay a greater rate of interest on the obligation is a sufficient consideration for the renewal agreement (10 C. J. S. 636, §160, note 52; 8 C. J. S. 437, note 25; Annotation in 52 L. R. A. (NS) 350; Casey-Swasey Co. v. Anderson, 37 Tex. Civ. App. 223, 83 S. W. 840; Quanchi v. Ben Lemond Wine Co., 17 Cal. App. 565, 120 P. 427). Such a renewal note should not be considered as a payment or satisfaction of the original note or indebtedness merely because of the increased interest, unless so intended by the parties (Huff v. Cole, 45 Ind. 300). A promissory note, given to the holder of an existing one in the same principal amount, payable at a future time, at an increased rate of interest, is nonetheless a renewal note, in the absence of an agreement otherwise. It extends or continues the identical amount of the obligation.

Section 201.08, F. S., imposing a documentary stamp on promissory notes, non-negotiable notes, obligations to pay money, assignment of wages, etc., imposes the tax upon the indebtedness or obligation, that is the principal obligation, and not on interest to accrue between the making of the instrument and its maturity. The same is true of other sections of the statute. The tax is the same whether the interest to accrue on the instrument is at the rate of 1% or 10% per annum, although the maturity date of the instrument may be many years from maturity. (See also 47 C. J. S. 783, et seq., §§545, et seq., and 49 Am. Jur. 212, §17.)



We stated, in our opinion 058-344, of Dec. 29, 1958, that "the definition of a 'renewal note' contained in §201.09, F. S., appears to be declaratory of the law of bills and notes relative to renewal notes." The reference to the "original contract and obligation" is directed to the principal contract or obligation of the original contract, which is the payment of the principal amount of the obligation.

Applying the familiar rule of statutory construction that taxing statutes are to be construed strictly against the state and in favor of the taxpayer, we feel that the above stated question must be answered in the negative.

059-12—January 22, 1959

### INSURANCE

#### REGULATION OF RATES—CONSTRUCTION OF CH. 630, F. S. —§§630.02 AND 630.08, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*  
QUESTION:

Should the insurance commissioner in the administration of §630.02, F. S., base his approval of insurance rates merely on the "past and prospective loss experience and all other relevant factors" of the business of the applicant alone or upon that of the industry generally of the applicable field of insurance?

"It is well settled that insurance is a business affected with a public interest, which is subject to state control and regulation" (Annotation of Supreme Court cases in 95 L. ed. 794, et seq.; see also 11 Am. Jur. 1064 §295; 29 Am. Jur. 59, §22; 44 C. J. S. 518, §§55 and 56; *State v. Knott*, 123 Fla. 295, 166 So. 835, text 837; *Knott v. State*, 140 Fla. 713, 192 So. 472, text 474). This justifies legislative regulation of insurance rates. "The purpose of such rating laws, it has been held, is to prevent discrimination in insurance rates, but at the same time to preserve open competition among the companies. A state may thus regulate insurance rates and may prohibit an insurance company from making any discrimination in rates charged on risks of the same class" (19 Appleman, *Insurance Law and Practice*, 138, §10,453).

The statutory power of the insurance commissioner of this state to approve insurance rates under Ch. 630, F. S., "includes the right to consider all elements and factors that properly have a bearing on the rates to be established, and it necessarily implies that the officer or board (in this case the insurance commissioner) shall take into consideration every factor essential to promulgating rates which will be as low to insured as is consistent with a reasonable return to insurer." (44 C. J. S. 533, §60). These authorities clearly set out the intent and purpose of statutes regulating insurance rates generally. They are designed to protect the public interest in obtaining safe insurance at reasonable rates. This is the guiding star when construing statutes relating to insurance and insurance rates.

Section 630.02, F. S., requires, when fixing and approving insurance rates, that "due consideration shall be given to past and prospective loss experience and all other relevant factors within the state, and, if necessary in order to establish a reasonable, adequate and not unfairly discriminatory rate, (due consideration) shall be given to past and prospective loss experience and all other

*relevant factors outside the state.* Due consideration shall be given to catastrophe hazards, if any, dividends, savings and unabsorbed premium deposits allowed or refunded by insurers to their policy holders, members and subscribers." (Emphasis supplied.) Rates so fixed and approved "shall be reasonable, adequate and not unfairly discriminatory." The general object of Ch. 630, F. S., "is to make certain that the citizen will secure the indemnity for which he contracts and that the rates and charges for insurance which may be required of him will be reasonable and nondiscriminatory." (44 C. J. S. 531, §60, note 40).

Section 630.08, F. S., provides, in so far as is here material, that "the commissioner shall, after consultation with all insurers and rating organizations affected thereby, promulgate reasonable rules and statistical plans, which may be modified from time to time, and which shall be used thereafter by each insurer in recording and reporting of its loss experience, in order that the total loss experience of *all insurers* may be made available at least biennially in such form and detail as may be necessary to aid him in determining whether rating systems comply with the standards set forth in §630.02. . . . In order to further uniform administration of rating laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult and cooperate with them with respect to rate making and application of rating systems."

When the above statutory provisions in Ch. 630 are read and considered with the remaining portions of said chapter, as well as with other statutes relating to insurance in this state, and in the light of the above authorities, we must come to the conclusion that the statutes of this state contemplate that the insurance commissioner when considering and passing on insurance rates, under and pursuant to Ch. 630, F. S., as well as insurers and rating bureaus and agencies when determining and fixing rates, must take into consideration the experience, not only of the insurer or insurers filing such rates, but of all other insurers, in the same field, doing business within this state. If the insurance commissioner deems the experience within this state insufficient to a proper determination of the rates to be fixed, it becomes his duty to require experience evidence of insurance business done in other states. Only when the insurance commissioner deems the insurance coverage of the company or companies fixing the rates, or for whom the rates are being fixed, sufficiently broad to constitute most of the type of insurance issued in this state and of sufficient experience to permit him to make a proper study of the question and determine the correctness of the rates to be charged, without resorting to the experience of other insurers, should he accept a filing based upon the experience of those making the filing only. The acceptance of the experience of those making the filing only must be the exception and not the rule, and must always be of sufficient extent to constitute the major part of the experience in that field.

Should a filing be made under §630.02, F. S., unsupported with sufficient "past and prospective loss experience and all other relevant factors," to enable the insurance commissioner to determine the sufficiency and correctness of the rate or rates demanded by the filing, the same may and should be disapproved unless and until sufficient "past and prospective loss experience and all other

relevant factors" are furnished the commissioner to enable him to make a proper determination of the matter and enable him to reach a proper and satisfactory conclusion as to the rate that should be approved by him, with due regard to the rights and interests of the public.

We note the order of disapproval issued by the commissioner on Dec. 18, 1958, disapproving a rate filing made by the national bureau of casualty underwriters, for and in behalf of certain insurers represented by it, under Ch. 630, F. S., upon the ground that said filing did not conform to the requirement of §630.02, F. S., that in such filings and the consideration thereof "due consideration shall be given to past and prospective loss experience and all other relevant factors within the state and, if necessary in order to establish a reasonable, adequate and not unfairly discriminatory rate, shall be given to past and prospective loss experience and all other relevant factors outside the state." This order of disapproval holds the filing insufficient as a pleading, and is, therefore, in the nature of a motion to dismiss or a demurrer to the filing as a pleading. We see no reason why the commissioner should not accord the applicant a hearing upon the legal question of the sufficiency of the filing as a pleading sufficient to make a *prima facie* case for the applicant. The hearing would be in the nature of a hearing in court upon a motion to dismiss or demur and should be conducted in a like or similar manner. At such a hearing only the question of the sufficiency of the filing as a pleading would be involved. Any attempt to extend the hearing to a final hearing would not be correct procedure. If the pleading be deemed sufficient by the commissioner under the statutes, then he should revoke the order of Dec. 18, 1958 and proceed to a final hearing upon the factual questions.

059-13—January 22, 1959

#### TAXATION

TAX ASSESSMENT—TANGIBLE PERSONAL PROPERTY—ATTACHMENT—CH. 76, AND §§76.05, 200.02 AND 200.30, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

When may taxes be deemed to have been assessed so the tangible personal property may be attached under authority of §200.30, F. S., and where the tax collector has reason to believe said property is being, or has been, removed from the county or disposed of prior to the time when the tax assessor has completed the tax roll and the millage has been fixed?

Section 200.30, F. S., provides, *inter alia*:

In case any tangible personal property *upon which the taxes shall have been assessed* is removed from the county in which said tangible personal property was assessed, it shall be lawful for the tax collector of the county, by his warrant, to authorize the sheriff of the county within this state to which such tangible personal property shall have been removed to collect such taxes. . . . The tax collectors of the several counties shall have the power to attach for taxes thereon any tangible personal property *which has been assessed* at any time before payment, if he has reason

to believe that such property is being, or has been, removed or disposed of. . . .; and all taxes assessed upon tangible personal property, from the date such taxes become due, shall have all the force and effect of a judgment and execution at law. . . . (Emphasis supplied).

Section 200.02, F. S., provides that tangible personal property taxes are a lien on all personal property of the taxpayer in the county in which they are assessed from January 1 of each tax year, and this lien shall be superior to all other liens except liens for other taxes. No error of the tax assessor or any other person charged with collection or assessment of taxes shall operate to defeat payment of said taxes, but may be corrected at any time and when corrected shall be construed as valid ab initio. All provisions of law relating to assessment and collection of revenue, unless otherwise specifically so declared, are held to be directory only, designed for the orderly arrangement of records and procedure in enforcing the revenue law.

The only question which must be determined is when the property may be deemed to have been assessed as required by statute. Assessment has been defined as "an official estimate of the sums which are to constitute the basis for an apportionment of a tax between the individual subjects of taxation within the districts. It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. . . . An assessment is completed when the persons and property to be taxed have been listed and the amounts to be collected have been estimated and apportioned" (Cooley on Taxation, Vol. 3, 4th Ed., text 2114, 2144).

The proper procedure for the tax collector or the tax assessor to follow, where either has reason to believe that the property is being or has been removed or disposed of so as to prevent or endanger the payment of taxes thereon when said taxes shall become due, is for the tax assessor to assess the property and place it on the tax roll at the preceding year's valuation and millage, and immediately certify the same to the tax collector who will immediately issue his warrant and deliver same to the sheriff for levy. Following this procedure would make unnecessary the complying with the provisions of Ch. 76, F. S., relating to attachments and particularly §76.05, F. S., relating to attaching personal property when indebtedness is not due.

The above general purpose of the statute is to prevent tangible personal property which was in the county on January 1 of the tax year from escaping taxation by being disposed of or removed from the county before taxes are due, which would be November 1 of the tax year. Taxes are deemed to have been assessed as of January 1 of the tax year, and therefore subject to the tax if they had the situs in the county as of January 1 of the tax year.

I believe this will answer your question as explicitly as same is subject to being answered.



059-14—January 23, 1959

#### TAXATION

#### DISTRICT SALES TAX—IMPOSITION FOR ADVERTISING PURPOSES—CH. 26294, 1949—CH. 212, F. S.

To: *William E. Harris, State Representative, Panama City*

#### QUESTIONS:

1. May a taxing district be established for the purpose of providing revenue for advertising purposes within the district?

2. May said district collect such revenue by means of a district sales tax similar to the state sales tax under Ch. 212, F. S.?

It is well settled in this state that an advertising tax may be imposed for state, county or municipal purposes (see *City of Jacksonville v. Oldham*, 112 Fla. 502, 150 So. 619; *City of DeLand v. Moorhead*, 96 Fla. 737, 119 So. 117; *Earle v. Dade County*, 92 Fla. 432, 109 So. 331). Furthermore, since the Florida constitution contains no provision or limitation on the creation of special taxing districts, it is within the power of the legislature to establish such districts and to impose taxes within such district for the accrual, either directly or indirectly, of benefits or advantages to the district (*Consolidated Land Co. v. Tyler*, 88 Fla. 14, 101 So. 280). The legislature of 1949 enacted chapter 26294, laws of Florida, special acts of 1949, Vol. 2, Part Two, which established certain advertising tax districts in Volusia county. This act authorized the county commissioners to levy and collect annually a special tax on all taxable property within the districts for the purpose of advertising the advantages and facilities in the districts. The act further provided that it take effect only upon ratification at a referendum election as provided therein. This act was upheld in *Miller v. Ryan*, 54 So. 2d 60 (Fla. 1951). These observations answer question 1 in the affirmative.

Question 2 is answered by our opinion 055-49, of March 4, 1955, appearing on p. 66 of the Biennial Report of this office for the years 1955-56.

059-15—January 26, 1959

(See 059-179)

#### STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM—SALARY AND AVERAGE COMPENSATION—§30, ART. III, §6, ART. VIII, §15, ART. XII AND §3, ART. XVI, STATE CONST.; CHS. 122, 123 AND 238, AND §§122.01, 122.02 AND 122.21-122-33, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. In determining the salary and average final compensation of members of the state and county officers and employees retirement system, is the reasonable value of living quarters, food and lodging furnished them considered as a part of their salary? (See 059-179 for answer to this question)

2. Is the value of such living quarters, food and lodging within the purview of the federal social security statutes, when applied to state and county officers and employees brought in under §418, title 42, of the U. S.



code, in the light of Ch. 122, F. S.?

3. If social security taxes upon the reasonable value of living quarters, food and lodging and other things furnished such state and county officers and employees, in addition to their cash wages, are required to be paid, from what funds should such taxes be paid?

For the purposes of the state and county officers and employees retirement system of this state (Ch. 122, F. S.), "state and county officers and employees" are defined in §122.02, F. S., as including "all full-time officers or employees who receive compensation for services rendered from state or county funds, or from funds of drainage district or mosquito control districts of a county or counties, or from funds of the state board of administration, . . . provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries. . . ." (subsection (1)). "Salary" is defined as the "fixed monthly compensation paid officers and employees, and, where officers' or employees' compensation is derived from fees set by statute, salary shall be the total cash remuneration received from such fees." (subsection (2)). "Average final compensation" is measured by the "average salary" of the member over a period of time (subsection (3)). We find nothing in said Ch. 122 indicating an intention on the part of the legislature to consider living quarters, food and lodging furnished officers and employees as part of their compensation. Neither do we find in former Chs. 121 and 134, F. S., nor in present Ch. 123, F. S., any legislative intention to consider living quarters, food and lodging furnished officers and employees thereunder as a part of their salaries.

Turning to Ch. 238, F. S., the retirement system for school teachers, we find said chapter defining "earnable compensation" as meaning "full compensation payable to a teacher working the full working time for his position. In respect to plans A, B, C and D only, in cases where the compensation includes maintenance the board of trustees shall fix the value of that part of the compensation not paid in money." The fact that Ch. 238, F. S., contains the above provision, not contained in either former Chs. 121 and 134, F. S., or in present Ch. 122, F. S., strongly indicates that living quarters, food and lodging furnished officers and employees thereunder are not to be considered as a part of the salary or average final compensation of members of the retirement system thereunder.

The compensation of county officers must generally be prescribed by law (§6, Art. VIII, State Const.). Laws making appropriations for the salaries of public officers and other current expenses of the state may not contain other subject matters (§30, Art. III, State Const.). Such salaries are payable upon the officer's requisition (§3, Art. XVI, State Const.). County salaried school officers are compensated from the county school fund, and county salaried officers from the county general fund (§15, Art. XII, State Const.). An examination of state budget commission reports to the 1957 and prior session of the legislature, reveals that such reports make reference to cash salaries for public officers and employees of the state and, at least generally, make no mention of housing, room or board for such officers and employees; these reports seem clearly to contemplate cash salaries for all officers and employees. Prior to 1933 the legislature in

the general appropriations bill set out specific sums for the salaries of many of the officers and employees of the state. We find nothing in the general statutes and laws of this state sufficient to overcome the theory that accommodations, such as housing, room or board furnished state and county officers or employees, are to be regarded as part of their compensation instead of merely to promote efficiency in the discharge of their duties. In *Bynum v. Knighton*, 137 Ga. 250, 73 S. E. 400, 1913A Ann. Cas. 903, the court remarked that "the residence provided by the county for the occupation of the jailer is no more to be regarded as part of the sheriff's compensation than the use of the sheriff's office in the courthouse. These accommodations are furnished by the county to enable the sheriff to more efficiently discharge the duties of his office, and are not official perquisites."

We, therefore, hold that living quarters, food and lodging, or any of them, furnished state and county officers or employees may not be considered as salary or compensation under the general laws of Florida, or under Ch. 122, F. S., but are accommodations furnished by the state or county to enable the officers and employees to whom furnished to more efficiently discharge the duties of their offices or employment.

As to question 2 we are dealing with a federal statute and not a general or state definition. Chapter 57-382 authorized the division of the Florida state and county officers and employees retirement system into two divisions; one designated as division "A" and the other as division "B," being created "for the purpose and within the contemplation of §218(d)(6), of the federal social security act (§418(d)(6), title 42, U. S. code) for the purpose of affording the opportunity to members of said division "B" of obtaining federal social security coverage." Although the retirement contributions by members of the state and county officers and employees retirement system (Ch. 122, and former Chs. 121 and 134, F. S.), have been and still are based upon the cash remuneration paid such members without including or taking into consideration the value of property, food, lodging and other things which may have been furnished such officers or employees, it does not follow that the same rule is applicable to the federal social security statutes, authorized to be made applicable through §§122.01 and 122.21-122.33, F. S. These sections appear to have been designed so as to secure to members of division "B" of the retirement system whatever social security rights contemplated by §218(d)(6) of the social security act. This raises a question of construction of federal statutes and one which must be finally answered by federal courts or authorities.

Whether or not the reasonable value of living quarters, food and lodging is "wages" within the purview of the federal social statutes when applied to state officers and employees brought in under §418, title 42, of the U. S. code, in the light of §§122.01 and 122.21-122.33, F. S., depends upon the meaning and construction of the federal statutes. We feel that it was the intention of the Florida legislature to afford such state officers and employees all rights contemplated by §418, title 42, of the U. S. code.

Each agreement entered into by the states under said §418, title 42, of the U. S. code, "shall provide (1) that each state shall pay to the Secretary of the Treasury, at such times as the Secretary of Health, Education, and Welfare may by regulations

prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 3101 and 3111, title 26, if the services of employees covered by the agreement constituted employment as defined in section 3121, title 26. . . ." As between the state and the U. S. the obligation to pay appears to be that of the state and not the state and county employees. The appropriation for the payment of these taxes, by the state to the U. S., appears to be contained in §122.30(3)(8), F. S.

Under §409, title 42, U. S. code, the term "wages" is defined as "remuneration *paid* after 1950 for employment, including the cash value of all remuneration *paid* in any medium other than cash," with certain exceptions mentioned in said section of the statutes. Under regulation 404.1026, adopted under the social security act, "generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food or clothing. . . ." (Emphasis supplied.) Although under the statutes and laws of Florida, housing, lodging, food, and the like furnished some of the officers and employees of Florida, especially in connection with the operation of state prisons and hospitals, are not under the laws of the state considered as a medium of payment or salary of such officers and employees, but as accommodations furnished by the state, as well as by some of the counties, for more efficient discharge of the duties of such officers and employees, the question of what are wages under the federal statutes is primarily a federal and not a state question and one that should be answered by the federal and not state authorities. We have spelled out the status of the housing, lodging, food and the like furnished some state and county officers, and employees, in connection with their employment, under the statutes and laws of Florida, which may be used by the federal authorities when construing the applicable federal laws.

In the light of the above and foregoing statutes, laws and authorities, we answer the above stated questions as follows:

1. Question 1 is answered in the negative, in so far as the state statutes and laws are concerned.

2. Question 2 is one that must be finally answered by the federal authorities or courts and not by this office; however, we have ascertained in this connection that under the laws and statutes of Florida, housing, lodging, food, and the like furnished state employees, as well as by some counties, are not usually to be considered as a part of their compensation.

3. There appears to be no reason to answer question 3 at this time; however, should it be finally determined that housing, lodging, etc., furnished state and county employees, or any of them, are in law and fact a part of the salary or wages of such officers and employees, we will, at that time, upon further request from you, determine the question.

059-16—January 26, 1959

### SHERIFFS

EXECUTION—RIGHT TO FORCIBLY ENTER PRIVATE RESIDENCES—RIGHT TO LOCK DOORS OF BUSINESS ESTABLISHMENT—§§2.01, 30.30(6), 55.55, 55.60 AND 78.10, F. S.

To: *Donald S. Genung, Sheriff, St. Petersburg*

#### QUESTIONS:

1. Is it within the authority of a sheriff's office to force entry into a private residence for purposes of levying on personalty to satisfy the following writs: attachment, execution or distress for rent?

2. Does the sheriff have authority to close and lock the doors of a business establishment for purposes of securing attached property until transportation is available to remove said property?

#### AS TO QUESTION 1:

At common law an officer could not break an outer door or forcibly enter a private residence for purposes of executing a civil writ for to do so would render the offending officer liable for damages in trespass, 80 C. J. S. Sheriffs and Constables, §62, and would further invalidate subsequent acts performed by that officer (47 Am. Jur. Sheriffs, Police and Constables, §57).

An annotation on the right of an officer to break into a building is found in 57 A. L. R. 210. At p. 210, concerning the right to break and enter a dwelling to serve a civil writ, there appears the following:

The common law, both in England and America, jealous of intrusion on domestic peace and security, regards every man's house as his castle and fortress, as well for his defense against injury and violence, as for his repose. It is this ancient and well-known principle that underlies the whole law of the right to break and enter a dwelling house to serve a civil writ or process. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcibly entered for the purpose of levying under a writ of execution.

Cases are cited from Delaware, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, New York, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, England and Canada.

21 Am. Jur., Executions, §131, recognizing the rule stated above, further points out, viz:

It seems moreover to be now well settled, though it was long held otherwise, that where an officer gets possession of a debtor's property by breaking into his dwelling house without proper authority and then levies on it on execution, the levy will be void.

Since the common law is by statute (§2.01, F. S.) in full force in this state, except where in conflict with statutes of the state, the rule is applicable in Florida.

Section 78.10, F. S., permits the sheriff to break into a



dwelling to serve a writ of replevin, but no such authority is granted where the officer has in hand writs of attachment, execution or distress for rent.

It should be pointed out that once peacefully and lawfully in the dwelling the officer may break inner doors in order to execute the writ. "This right is available after a demand and refusal of admittance, or without such demand and refusal where such would be a useless ceremony" (21 Am. Jur. §132, Executions). (See also, 57 A. L. R. 220.)

We are informed that in at least one county in this state the sheriff has made the practice of applying to the court for an order permitting or directing that he shall forcibly enter a private residence where such is necessary for the purpose of levying on personal property to satisfy writs in his hands for execution. It is entirely possible that the sheriff in such instance is proceeding under §30.30(6), F. S., providing:

(6) No sheriff shall be liable for making any levy pursuant to the specific order of a court of competent jurisdiction.

It is suggested, then, that in the event your office is placed in the position where it is necessary, in your sound judgment, to forcibly enter a private residence, you may wish to seek a specific order of court of competent jurisdiction so permitting or directing.

While the sheriff is not concerned with the supplementary proceeding after an execution is returned unsatisfied, it is suggested that where property is located within a private residence and there may be a question as to the authority of the sheriff to forcibly enter, the execution should be returned unsatisfied. Sections 55.55 and 55.60, F. S., clearly grant authority to the court before whom the supplementary proceeding is brought to require any property in the hands of the debtor which is not exempt to be applied towards satisfaction of the debt. Consequently, the creditor could seek, after the return of the execution unsatisfied, relief under these provisions.

This answers question 1.

#### AS TO QUESTION 2:

An officer levying upon personal property has a right to the temporary possession of the premises long enough for him, with reasonable diligence, to inventory and remove for storage the property levied upon and may, without liability to the debtor, have possession a reasonable time for packing and removing the goods (7 C. J. S., Attachment, §216). With the permission of the occupant of the business establishment this may include closing and locking the building for an indefinite period of time (*Ramsey v. Burns*, 69 P. 711). It is to be noted, however, that without such permission there is no authority to bar from the building those with a right to its use (*Stevens Bros. Co. v. Robertson*, 131 P. 326). In such instances the sheriff must take such other measures as are prescribed in the discharge of the writ.

It should be emphasized that the property should be removed as soon as possible.

Until such time as a Florida court of last resort holds otherwise, I must answer question 2 in the negative.



059-18—January 30, 1959

### COUNTIES

LIABILITY FOR MEDICAL EXPENSES OF PRISONERS—§3, ART. XIII, AND §9, ART. XVI, STATE CONST.; CH. 25728, 1949; CHS. 155 AND 401, AND §§125.01, 155.16, 282.01

(1) 25. g., 384.14, 398.18, 401.06, 401.13, 401.14, 678.38, 944.31, 945.12 AND 951.03, F. S.

To: *Francis W. Williams, Clerk Circuit Court, Inverness*

### QUESTION:

**Is a county liable for medical and surgical expenses incurred when its sick or injured prisoners, or sick or injured unfortunates found in the county, are sent to a hospital or to a physician, by police or other public officers, for care and treatment or either?**

Section 3, Art. XIII, State Const., provides that "the respective counties of the state shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society. . . ." Under §125.01, F. S., boards of county commissioners are authorized to "care and provide for the poor and indigent people of the county." County hospitals operated under Ch. 155, F. S., are operated "for the benefit of the inhabitants of such county and for any person falling sick or being injured or maimed within its limits. . . ." Under §155.16, of said statute "every person who is not a pauper shall pay to such board or such officer as it shall designate, a reasonable compensation for occupancy, nursing, care, medicine and attendance, according to the rules and regulations prescribed by the said board." Section 678.38, F. S., provides that any surplus from warehouse and wharfinger sales, after the lapse of one year, be paid over to the county to "be applied by the county commissioners for the relief of the poor of such county."

The department of corrections maintains a medical department at the state prison at Raiford for the medical and surgical care of state prisoners, as well as at the industrial schools. The boards of county commissioners are required to "provide or cause to be provided; substantial food, clothes, shoes, medical attention, etc., for said (county) convicts as are required for state convicts . . ." (§951.03, F. S.). One of the duties of prison inspectors in this state is to inspect state and county prisons as to "physical conditions, cleanliness, sanitation, safety, comfort . . ." (§944.31, F. S.). Prisoners requiring specialized medical treatment may be transferred to an appropriate institution, under §945.12, F. S. Compulsory treatment of drug addicts (§398.18, F. S.) and persons with venereal diseases (§384.14, F. S.) are provided by the statutes of this state. The statutes cited and referred to in this and the previous paragraphs hereof clearly show an intention on the part of the legislature to provide for the care and treatment of the sick and injured of the county who are unable to provide for their own care and treatment. These statutes tend to fix a public policy of the state and its legislature.

"In most, if not all, jurisdictions, statutes are to be found which require custodians or prison authorities to maintain prisons under their control and custody in a clean, healthful, safe,

and sanitary condition." (41 Am. Jur. 900, §23). This is substantially the requirement in Florida (see §944.31, F. S., *supra*). The fact that an "indigent" is a prisoner would not seem to deny him the relief due him under "poor laws" (70 C. J. S. 171, §78d). The attorney general by opinion of Oct. 3, 1946 (1945-6 B. R. 234) held that a county was liable for medical expense incurred by a sheriff in the treatment of a prisoner injured by the sheriff while resisting arrest. In another opinion of the attorney general (1921-2 B. R. 352), prepared by former Justice Buford of the supreme court of this state when he was attorney general, it was held that the sheriff could bind the county for expenses incurred in the treatment of a prisoner held in jail. The sheriff of a county, as well as his deputies, are officers of the county, and state patrolmen are agents of the state directed by law to deliver their prisoners to the sheriff of the county wherein arrested, so that they hold their prisoners in their official capacities, as officers of the county or for the county, and not in their individual capacities. Fees incurred in the arrest and keeping of persons charged with crime, prior to trial, and the expenses of the trial of such persons, are county and not state expenses (§9, Art. XVI, state constitution).

Many county hospitals have been established under local and special laws, for example, Ch. 25728, acts of 1949, establishing such a hospital in Citrus county. This act empowers the hospital established thereby to provide "for the admission thereto and treatment of such charity patients as apply therefor and are citizens of Florida and residents of Citrus county for the last two years." Pay patients are authorized by the said act. Where an injured person is carried or sent to a hospital by a third person who is under no legal duty to the injured person, he incurs no liability for services rendered the injured person in the absence of an agreement, express or implied, that he will pay such charges (70 C. J. S. 1023, §§68-70). It is stated by Alexander, *Law of Arrest*, Vol. 1, p. 640, §154, that it is the duty of a sheriff to provide his prisoner with necessary medical attention. He may even be liable in tort if he fails to do so (*State v. National Surety Co.*, 162 Tenn. 547, 39 S. W. 2d 581). The sheriff, acting as agent of either the prisoner or the county, would not seem to be personally liable for such treatment (*Spicer v. Williamson*, 191 N. C. 487, 44 A. L. R. 1280, 132 S. E. 291). Such expenses would seem to be legal expenses of the sheriff's office (47 Am. Jur. 890, §101).

Under §9, Art. XVI, of the state constitution, the expense of keeping prisoners in the county jail, and the fees of the sheriff or other officer keeping them, as well as the expenses of trial, are county and not state expenses, payable usually from the county fine and forfeiture fund. It is not to be presumed that the sheriff would be charged with the furnishing of a prisoner with necessary medical or surgical services at his own personal expense; it is doubtless an expense of the sheriff's office or of the county. We feel that it is an expense of the county. We hold that the medical and surgical expenses necessary for the keeping of a prisoner, although incurred by the sheriff, may be paid by the county.

Treatment and medical expenses necessary for sick and injured unfortunates found in the county, who may be classified under §3, Art. XIII, of the state constitution, are expenses of the

county of their residence when they are unable to pay their own expenses, and may be paid by such county.

Chapter 401, F. S., makes provision for "hospital service for the indigent" through state and county cooperation to be administered by the state board of health, to the extent funds are available. To carry out the purposes of this chapter the sum of four million dollars was made available, by the current biennial appropriations act (item 25 g. §1, Ch. 57-424), which sum is for the administration of the "hospital service for the indigent" program during the current biennium. An "indigent person" within the purview of this chapter is a person within the state who may be helped markedly by hospital treatment and who is unable to provide such treatment for himself.

The first priority for payment from the fund administered under the provision of Ch. 401, F. S., is for the cost of hospital care provided for the benefit of the acutely ill, medically indigent nonresidents of the county (§401.13, F. S.). There is also a reserved fund established under this chapter for the care of medically indigent out-of-state residents (§401.14, F. S.). It is the intention of this chapter to provide a program designed and administered so as to pay the cost of hospitalization for those residents of this state or *persons within the state who become actually ill or injured*, who can be helped by treatment in a hospital (§401.06, F. S.). Where a county participates in the program established by Ch. 401, F. S., it would seem that the cost of caring for its sick or injured prisoners or sick or injured unfortunates found in the county, properly comes within the intent of this chapter.

Although we hold that the medical and surgical expenses of persons mentioned in the above stated question may be paid by the county where they are held prisoners, or of the county of their residence if not held as prisoners, we are unable to say from the authorities that the same may be enforced by action or suit against the county or counties. However, it is my opinion that the expenses incurred for hospital care for persons as outlined in your question may be included in the program for "hospital service for the indigent" under the provisions of Ch. 401, F. S.

059-19—January 30, 1959

### TAXATION

#### STATE TAXATION OF TERRITORIAL BONDS

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**May a state impose a tax upon bonds and other obligations issued by a territory of the U. S., or a municipality or county therein, where such bonds and obligations are held by persons residing elsewhere?**

It is well established that "all territory within the jurisdiction of the United States not included in any state must, necessarily, be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States." (First National Bank of Brunswick v. Yankton, 101 U. S. 129, 11 Otto 129, 25 L. ed. 1046, 1047, 49 Am. Jur. 326, §113). A "territory" has been frequently referred to as an instrumentality of the federal government (See Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, 323, 36 S. Ct. 298,

60 L. ed. 664; *First National Bank of San Jose v. Calif.*, 262 U. S. 366, 43 S. Ct. 602, 67 L. ed. 1030, 1035). Instrumentalities and agencies of the U. S. government are immune from state and local taxation unless authority to do so is expressly granted by statute (84 C. J. S. 207, pp. 393-4).

The leading case on state taxation of territorial obligations is *Farmers' & Mechanics' Savings Bank of Minneapolis v. Minnesota*, 232 U. S. 516, 34 S. Ct. 354, 58 L. ed. 706, which case has not been overruled. In this case the state of Minnesota attempted to assess and collect a property tax on bonds issued by municipalities in the territory of Oklahoma which were being held by a bank in Minnesota. The court held that such municipalities were in fact instrumentalities and agencies of the federal government and that a tax upon bonds and other obligations of such agencies would be a tax on the agencies themselves. The court thus placed the same immunity from state taxation on the bonds of territories and municipalities therein as exist in favor of federal agencies, and held the Minnesota tax invalid. The court went further in holding that even though the territory subsequently became a state of the Union "to deprive bonds of the former description of their immunity from state taxation, and this because of the subsequent action of Congress in erecting the territories into a state, *with or without an assumption by the new state of the obligation of the former federal agency*, would be in effect to impair the obligation of the contract." (Emphasis supplied.) Since the time of this case (1914) it has been cited numerous times as holding that territorial bonds were "bonds of the United States" (*Northwestern Mutual Life Ins. Co. v. Wisconsin*, 275 U. S. 136, 48 S. Ct. 55, 72 L. ed. 202, 206) and "federal obligations" (see *National Life Ins. Co. v. U. S.*, 277 U. S. 508, 48 S. Ct. 591, 72 L. ed., 968, 976).

We find no congressional expression changing the rule of the *Farmers' bank* case, *supra*, such as would permit state taxation of such federal obligations. For this reason and for the reasons stated in the above cited authorities, we are of the opinion that your question should be answered in the negative.

059-20—February 2, 1959

#### TAXATION

GROSS RECEIPTS TAX—FACTORY MUTUAL FIRE INSURANCE COMPANIES OPERATING ON DEPOSIT PREMIUM PLAN—\$205.43, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

On what basis should factory mutual fire insurance companies pay the gross receipts tax imposed by \$205.43, F. S.?

The associated factory mutual fire insurance companies are a group of eight property insurance companies specializing in the insurance of high grade industrial and manufacturing property. Their method of operation is somewhat different from that of other insurance companies. At the time a policy is issued the policyholder is required to pay a sum of money called a "premium deposit" from which his share of the losses and expenses of the company will be paid while the policy is in



force. Each month a computation of losses and expenses is made and a proportionate amount is charged against each premium deposit. At the end of the policy term the remainder of the premium deposit is available for return to the policyholder.

Section 205.43, F. S., provides:

. . . An amount equal to two per cent of the gross amount of receipts of insurance premiums or assessments, including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, paid by policyholders or certificate holders and paid upon surety, indemnity or reciprocal or interinsurance contracts or agreements, in this state, which amount shall be calculated upon gross premiums or assessments, including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, received, omitting premiums on reinsurance accepted, and less return premiums or assessments, but without deductions for reinsurance ceded to other companies, and without deductions for moneys paid upon surrender of policies or certificates for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of premiums or assessments, and without deductions on account of dividends of any nature or amount paid and credited or allowed to holders of insurance policies, certificates, or surety, indemnity, or reciprocal or interinsurance contracts or agreements; . . .

The practice under said section has been to require the factory mutual companies to report premium deposits received during the tax year and to permit a deduction for unused premium deposits returned to policyholders. The tax has not been levied upon the gross premium deposits but upon the net deposits retained by the company during the tax year. As we understand it, the factory mutual companies are requesting that they be taxed upon the "absorbed premiums." That is, they desire to be taxed on the amount which they charge against the policyholders' premium deposits. To accomplish this result the following formula has been submitted:

1. Each factory mutual company shall circulate to the other factory mutual companies its average annual absorption for each term in years as determined by dividing the absorption for each term by the number of years represented by each term. This information is to be furnished by December 31 of each year.

2. Each company in preparing its report for Florida shall make the following calculations:

- (a) Determine percentage distribution as of the end of year by participating factory mutual companies of direct countrywide factory mutual premium deposits in force.
- (b) Using the factors obtained from 1 and 2(a), determine the average annual absorption percentages on direct business for each term in years.
- (c) Determine the percentage distribution by term in years of direct factory mutual countrywide premium deposits in force at end of year. (Pre-



miums received on nuclear energy policies shall not be considered as factory mutual premium deposits for this purpose, since they are written at the rates of the nuclear insurance rating bureau and are not premium deposits.)

- (d) Determine the overall average annual absorption on the company's direct premium deposits by weighing the annual absorption percentages obtained by step 2(b) by the distribution secured by step 2(c).
- (e) Multiply the percentage obtained by step 2(d) by the direct premium deposits in force at the end of the year in Florida to obtain regular absorptions taxable to Florida.
- (f) Add to the results obtained by 2(e) extra absorptions taken during the year applicable to risks located in Florida. Also add the premiums on any nuclear energy risks written in Florida. The sum equals the total taxable premiums for the year.

In the long run the formula proposed by the factory mutual companies should result in the same amount of tax as the method of the insurance department. Ultimately that part of a premium deposit not "absorbed" is returned to the policyholder and constitutes a deduction from the deposits received in that year. It appears, however, that the procedure which has been followed by the insurance department since 1951, when the factory mutual companies were first admitted to do business in this state, is more nearly in accord with §205.43, F. S., than is the formula of the factory mutual companies described above. The factory mutual companies' formula does not provide for a determination of the exact amount of premium deposits "absorbed" during the tax year but provides for an estimate of this amount. The method of the insurance department more nearly approaches the statutory formula of "gross amount of insurance premiums or assessments . . . less return premiums or assessments."

059-21—February 2, 1959

### BEAUTY CULTURE LAW

LICENSING REQUIREMENTS—CONSTRUCTION OF BEAUTY CULTURE PRACTICE—CHS. 476 AND 477, AND §§476.02, 476.04 AND 477.03, F. S.

To: *Frederick H. Hope, Assistant County Solicitor, Palm Beach*

#### STATEMENT OF FACTS:

The individual in question operates a business in Palm Beach county. Said business facility consists of a small building with two large rooms and attendant closet space and storage. Entering the front door of the establishment one finds himself in the first large room which is designed and used for the obvious purpose of catering to hair treatment of women patrons.

Immediately adjoining the first room and connected by a door opening is the second room which contains a barber chair and is used for the express purpose of hair treatment of male patrons.

The above individual has one license for the premises and instant license is a beautician license. Both rooms on the premises are under the same roof and use the the same front door for business purposes.

**QUESTION:**

Is an individual who is licensed to practice beauty culture within the meaning of Ch. 477, F. S., permitted to also engage in hair treatment of male patrons within the same business confines and under the provisions of a beautician's license without obtaining a license to practice barbering under Ch. 476, F. S.?

Section 476.02, F. S., defines barbering and barber shops as follows:

Any one or any combination of the following practices (when not done for the treatment of disease or physical or mental ailments and when done for payment either directly or indirectly or without payment for the public) constitutes the teaching and practice of barbering: shaving, or trimming the beard or cutting, waving or bobbing the hair; facial and scalp massages or treatments with oils, creams, lotions or other preparation; singeing, shampooing or dyeing the hair or applying hair tonics; applying cosmetic preparation, antiseptics, powders, oil, clay or lotions to scalp, face or neck.

For the purpose of, and as used in this chapter the term "barber shop" is defined to embrace and include any establishment or place of business wherein the practice of barbering is engaged in or carried on.

Section 476.04, F. S., provides, among other things, that the following shall be exempt from the provisions of Ch. 476 relating to barbers:

The provisions of this chapter shall not be construed to apply to:

(4) Persons practicing beauty culture;

Section 477.03, F. S., provides, among other things, that the practice of beauty culture shall be defined as follows:

(1) Any one or any combination of the following practices (when not done for the treatment of disease or physical or mental ailments and when done for payment either directly or indirectly or without payment for the public generally) constitutes the teaching and practice of beauty culture:

- (a) Cutting or bobbing the hair.
- (b) Facial and scalp massage or treatment with oils, creams, lotions or other preparations.
- (c) Singeing, shampooing, or coloring the hair or applying hair tonics.
- (d) Applying cosmetic preparations, antiseptics, powders, oil, clay, or lotions to scalp, face, or neck.
- (e) Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any

person.

- (h) Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances, or chemical heat devices or heat materials, or chemical means.

(2) For the purpose of this chapter and as used herein, the term "beauty shop" is hereby defined to embrace and include any establishment or place of business wherein the practice of beauty culture as hereinabove defined is engaged in or carried on.

The only judicial interpretation we have of any of the above statutes is found in *Brown v. Watson*, 116 Fla. 56, 156 So. 327, which was decided by our supreme court in 1934 prior to the enactment of Ch. 16800, laws of 1935, which attempted for the first time to regulate the practice of beauty culture in Florida. In that case the court based its decision that the person was practicing barbering instead of beauty culture largely upon the fact that there was no statutory definition of beauty culture, the practice of which was exempt under the barber's act.

In *Brown v. Watson*, supra, the court said:

Unfortunately for the petitioner, the act did not define "beauty culture," and, therefore, we are without a guide to direct us in determining what the legislative intent was when it used the words "persons practicing beauty culture." Certainly it did not mean that the practice of beauty culture included "shaving, or trimming the beard or cutting or bobbing the hair." Nor did it mean "facial and scalp massages, or the treatments with oils, creams, lotions or other preparations." Nor did it mean "singeing, shampooing or dyeing the hair or applying hair tonics." Nor did it mean "applying cosmetic preparations, antiseptics, powders, oil, clay or lotions to scalp, face or neck," because the act (§2) specifically declared that these operations, either separately or when combined constitute "the teaching and practice of barbering."

Now, as you can see from the foregoing quoted section from Ch. 477, F. S., regulating the practice of beauty culture, the practice of beauty culture has been defined to include practicing all of these items included in the definition of the practice of barbering except "shaving or trimming the beard."

In view of the foregoing, it is my opinion that a person licensed under Ch. 477, F. S., to practice beauty culture may perform all the acts embraced in the definition of beauty culture as set forth in §477.03, F. S., regardless of whether the patrons be male or female; that he may do so without being licensed under Ch. 476, relating to the practice of barbering, *provided that the said person does not hold himself out to be a barber or to be engaging in any manner in the barbering craft.*

The facts given in your letter are not sufficient to determine just what hair treatments are given by the licensed beautician, to enable me to make a determination of the facts as to whether or not he is engaged in the practice of barbering.

059-22—February 2, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—PARTICIPATION BY TEMPORARY  
EMPLOYEES—CH. 30778, 1955; CH. 122, AND  
§§122.02 AND 122.04, F. S.**

To: *Miller Lang, County Attorney, Trenton*

**QUESTIONS:**

1. Is a temporary employee of a county park board eligible to participate in the state and county officers and employees retirement system, under Ch. 122, F. S.?

2. Is it mandatory that a permanent employee of a county park board participate in the state and county retirement system set forth in Ch. 122, F. S.?

Section 122.02, F. S., provides that "state and county officers and employees" eligible to participate in the retirement system set forth in Ch. 122, F. S., ". . . shall include *all full-time officers or employees* who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or services from any agency, branch, department, institution or board of . . . any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not. . . ." (Emphasis supplied.)

An examination of Ch. 30778, 1955, creating the Gilchrist county park board, indicates that said park board is an ". . . agency, branch, department, institution or board of . . . any county of the state . . ." within the purview of Ch. 122, F. S. The purpose of the board is to develop and provide for the maintenance of parks within the county; the board is bound by the same rules and regulations binding the board of county commissioners of the county; members of the board may be removed as any other county official; county equipment is to be used to maintain parks established under the authority of the board; and county law enforcement officials are directed to enforce the rules and regulations of the board. As §122.02, F. S., *supra*, includes only ". . . all full-time officers or employees . . ." within the coverage of Ch. 122, F. S., it appears that part-time or temporary employees of the board would not be included in the state and county officers and employees retirement system. We, therefore, answer question 1 in the negative.

Section 122.04, F. S., provides that the coverage of the state and county officers and employees retirement system ". . . shall be *compulsory* as to all persons who enter the employment of the state or county of the state (on a full-time, permanent basis) on or after July 1, 1947 . . ." (Emphasis supplied.) Ch. 30778, 1955, creating the Gilchrist county park board, became a law on June 23, 1955, so that any employee of said board would have to have become employed by the board after July 1, 1947. We, therefore, are of the opinion that it is compulsory that all *permanent employees* of the Gilchrist county park board participate in the state and county officers and employees retirement system as set forth in Ch. 122, F. S.

059-23—February 3, 1959

**TAXATION**  
**NON-PROFIT CORPORATION—CHARITABLE EXEMPTION**  
**FROM AD VALOREM TAXATION—§1, ART. IX AND**  
**§16, ART. XVI, STATE CONST.; §192.06, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Under the facts as outlined in the request for opinion, is the Florida Lutheran retirement center of Volusia county, DeLand, entitled to tax exemption as a charitable institution?**

It appears from the request for opinion and the comptroller's file in the case that the Florida Lutheran retirement center is not a legal entity but is wholly owned by the Lutheran social service of the New York conference of the Augustana evangelical Lutheran church, which is a New York corporation licensed to do business in Florida. The Florida Lutheran retirement center is a home for elderly people, consisting of 21 "living units" or "rental units" which are rented on the basis of \$110 per month, single occupancy, or \$200 per month for married couples. This charge includes, besides the unit rented, food, maintenance and medical care so long as same is "ordinary sick care."

It appears that the cost of furnishing these services amounts to \$150 per month per person, and the difference of \$40 between what the resident pays and the cost is paid by the Lutheran social service of the New York conference of the Augustana evangelical Lutheran church.

Your request for opinion also recites that, in the event that indigents otherwise qualified make application, they will not be denied because they are unable to meet the required monthly rental.

The legislature is authorized, under §1 of Art. IX of the Florida constitution, to provide for tax exemption to property used for educational, literary, scientific, religious and charitable purposes. Section 192.06, F. S., was enacted pursuant to said §1, Art. IX of the state constitution, subsection 3 of which provides exemption for property used for educational, literary, benevolent, fraternal, charitable and scientific purposes in this state.

Section 16, Art. XVI of the state constitution, provides that property held and used exclusively by corporations for religious, scientific, educational, literary or charitable purposes are entitled to tax exemption.

In *Bancroft Inv. Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, the Florida supreme court pointed out that exemptions from taxation enumerated in §192.06, F. S., are on the theory that the property so exempt is held and used for municipal, educational, scientific, literary, religious or charitable purposes. This doctrine was affirmed in *State v. Escambia County*, 52 So. 2d 125; *Saunders v. City of Jacksonville*, 157 Fla. 240, 25 So. 2d 648. A criterion for exemption from taxation is the character of the use to which the property is put and not the character of ownership. *State ex rel Cragor Co. v. Doss*, 150 Fla. 486, 8 So. 2d 15; *City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744. Such exemptions being in the nature of special privilege should be strictly construed against the claimant and in favor of the taxing power (*Lummus*



v. Florida-Adirondack School, 123 Fla. 810, 168 So. 232; Lummus v. Miami Military Acad., Inc., 123 Fla. 832, 168 So. 241; Steuart v. State ex rel Dolcimascolo, 119 Fla. 117, 161 So. 378; State v. Inter-American Center Authority, 84 So. 2d 9, 16).

The fact that a charge was made for rooms is not necessarily fatal to the contention that homes for the aged are within the exemption for charitable institutions. *Miami Battle Creek v. Lummus*, 140 Fla. 718, 192 So. 211, wherein the Florida supreme court held that a combination hospital, educational and scientific corporation might be tax-exempt even though the patients who were able to pay were charged for services rendered, and *Orange County v. Orlando Osteopathic Hospital* (Fla.) 56 So. 2d 285, wherein the above holding was reaffirmed. (Also see *Fellowship Foundation v. Paul*, (Fla.) 86 So. 2d 808.)

Homes for the aged, homes for orphans, and similar institutions, have been held to be charitable institutions with the purview of tax-exemption statutes (*People v. Jessamine Withers Home*, 312 Ill. 136, 143 N. E. 414, and cases cited; cases cited in annotations in 34 A. L. R. 648-652 and 657-659; 62 A. L. R. 333 and 337, 108 A. L. R. 287 and 289; 51 Am. Jur. 586. Section 694.) The fact that inmates may pay all or a part of their upkeep and expenses will not prevent the institution from being a charitable one. Annotations in 34 A. L. R. 637, 62 A. L. R. 330, and 108 A. L. R. 286. "The courts are agreed that a charitable institution does not lose its charitable character and its consequent exemption from taxation merely because recipients of its benefits who are able to pay are required to do so, where funds derived in this manner are devoted to the charitable purposes of the institution." *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, 218.

In view of the above facts and authorities, it appears that your question is one of fact, and therefore must be answered by the tax assessor himself on the basis of competent evidence. If the tax assessor should find that the institution is operated as a nonprofit institution for the benefit of aged persons who are not self-supporting, or not entirely self-supporting, it would appear that it would be entitled to the tax exemption. This contention appears to be amply proven in the file, but the determination of this question must be by the tax assessor as he must likewise determine the authenticity of the facts as presented. The fact that the institution may charge those able to pay all or part of their keep would not seem to affect the status of the property to exemption; provided that the proceeds from such payment are used by the institution for charitable purposes and not for distribution among the members of the corporation or for the payment of unreasonably high salaries. *Miami Battlecreek v. Lummus*, supra.

As stated in A. G. O. 050-331, dated July 10, 1950, as reported in the 1949-50 Biennial Report of the Attorney General, at page 223: "Although the evidence before us indicates that the institution is entitled to the exemption claim, it is the duty of the tax assessor to check the facts and apply them to the observations in this opinion."

059-24—February 3, 1959

#### ADVERTISING

MISLEADING ADVERTISING—OPTOMETRY—CH. 463, AND §§463.01, 463.14 AND 817.06, F. S.

To: William C. Pierce, Attorney, State Board of Optometry, Tampa

#### QUESTION:

Is the advertising matter entitled "What is an Ophthalmologist?" as published by the National Medical Foundation for Eye Care, 250 West 57th Street, New York 19, New York, which states that an optometrist "is not qualified or permitted to diagnose or to treat ocular disease," within the scope of false or misleading advertising and thus prohibited under §§463.14 and 817.06, F. S.?

Section 463.01, Florida Statutes, provides, among other things, as follows:

The practice of optometry is declared a profession, and, for the purpose of this chapter, is defined as follows, viz: to be the *diagnosis of the human eye and its appendages*, and the employment of any objective or subjective means or methods for the purpose of determining the *refractive powers of the human eyes, or any visual muscular, neurological or anatomic anomalies of the human eyes and their appendages*, and the prescribing and employment of lenses, prisms, frames, mountings, orthoptic exercises, light frequencies and any other means or methods for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eyes and their appendages. An optometrist is one who practices optometry in accordance with the provisions of this chapter. (Emphasis supplied.)

In view of the foregoing definition of optometry, it appears that the treatment of ocular diseases is not a part of the practice of optometry; therefore, that part of the pamphlet is not false or misleading.

It further appears by the statutes and possibly from the professional definition that an optometrist is restricted to diagnosing the things mentioned in Section 463.01, Florida Statutes, and not diseases.

Relative to what constitutes diagnosis by an optometrist, the Supreme Court of Texas held in Baker State, Texas Criminal Reporter, 240 S. W. 924, 22 A. L. R. 1167, that:

*The optometrist does not undertake to determine what disease, if any, exists in an eye which he examines. According to the proofs, it is sufficient reason for a reference of the case to a physician if there is that which gives him reasonable grounds for suspecting that disease exists. It seems to us that it would be applying a severe rule and stretching language beyond its natural force if we should say that such action on the part of an optometrist is "diagnosing diseases."* (Emphasis supplied.)

Section 463.14, Florida Statutes, provides, among other things, as follows:

It is unlawful for any person, firm or corporation

... to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess better qualifications or are best trained to perform the service or to render any optometric services pursuant to such advertising.

Section 817.06, Florida Statutes, provides, among other things, as follows:

No person, persons, association, copartnership, or institution shall, . . . knowingly or intentionally make, publish, disseminate, circulate or place before the public, or cause, directly or indirectly, to be made, published, disseminated or circulated or placed before the public in this state in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding such certificate, diploma, document, credential, academic credits, merchandise, security, *service or anything so offered to the public, which advertisement contains any assertion, representation or statement which is untrue, deceptive or misleading.* (Emphasis supplied.)

In view of the foregoing it appears that the pamphlet in question which states that an optometrist is not qualified or permitted to diagnose to the limited extent authorized by Chapter 463, Florida Statutes, is in conflict with the Florida Statutes.

059-25—February 3, 1959

#### TAXATION

#### LICENSE TAXES—LIQUID PETROLEUM DEALERS—CHS.

205, 208, 209, AND 526, AND §209.05 (4) F. S.

To: J. Edwin Larson, State Fire Marshal, Tallahassee

#### QUESTION:

Chapter 526, Florida Statutes, provides for the licensing of dealers in liquefied petroleum gas. Chapter 209, Florida Statutes, provides for the levying of a tax on motor fuels other than gasoline and provides for the licensing of dealers in these special fuels. Under which chapter should a person who dispenses liquefied petroleum gas as a motor fuel be licensed?

The purpose of Chapter 209, F. S., is to impose a tax on special motor fuels equivalent to the tax on gasoline imposed by Chapter 208, F. S. The collection of the tax is imposed upon the retail distributor of the special motor fuel and he is required to post a bond and to secure a license from the State Comptroller. The license fee is one dollar. (Section 209.05(4), F. S.) It is clear that to insure collection of the special fuels tax, dealers must be licensed by the State Comptroller.

The license tax imposed by Chapter 526, F. S., upon a dealer in liquefied petroleum gas is \$125.00. This fee is placed in a special fund "to defray the expenses in administering this law." Although an examination is not required as a prerequisite to licensing under Chapter 526, F. S., the State Fire Marshal is given authority to promulgate and enforce rules and regulations pertaining to the safe handling of liquefied petroleum gas and has the authority to suspend or revoke licenses of persons violating these

rules and regulations. This chapter is designed for public welfare and safety. It is clear, therefore, that for the regulatory purposes of Chapter 526, F. S., it is essential that dealers in liquefied petroleum gas be licensed by the State Fire Marshal and subject to his control.

It is my opinion that a person who dispenses liquefied petroleum gas as a motor fuel must secure a license from the State Fire Marshal under Chapter 526, F. S., and must also secure a license from the State Comptroller under Chapter 209, F. S. The purposes of these chapters are dissimilar and not in conflict and neither can be said to have superseded or repealed the other. In this opinion I am not unmindful of opinion 047-342 dated October 13, 1947, in which my predecessor held that a license under Chapter 526, F. S., is in lieu of an occupational license under Chapter 205, F. S. I reaffirm that holding, but to the extent that opinion 047-342 goes beyond said holding and is in conflict with this opinion, it is to that extent repealed.

059-26 (058-202 revised)—February 4, 1959

#### TAXATION

LICENSE TAXES—HYPNOTISTS—MEDICAL PROFESSION—  
§§205.41 AND 205.411, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Is a hypnotist who practices hypnosis only in connection with medical science, or one who teaches hypnosis to licensed medical doctors and dentists exclusively, within the purview of §§205.41 and 205.411, F. S.?**

Section 205.41, F. S., provides:

Every fortune teller, clairvoyant, palmist, astrologer, phrenologist, character reader, spirit medium, absent treatment healer, or mental healer, and every person engaged in any occupation of a similar nature shall pay a license tax of one hundred dollars; provided that this section shall not be construed to require members of any recognized Christian denomination who pray for the sick, to obtain a license.

Section 205.411, F. S., requires a permit from the board of county commissioners before licensing any of the occupations outlined in §205.41, and provides that prior to issuance of such a permit the applicant must (1) have resided in Florida for two years and be a registered voter in the county where the license is applied for, (2) establish good moral character by five reputable citizens of the county, (3) submit application to the clerk, who makes investigation and reports to the board of county commissioners, (4) board of county commissioners to consider application and report and permit or deny issuance of the license.

The blue book entitled "Compilation of Laws of Florida" relating to the assessment and collection of occupational licenses, prepared by the state comptroller, dated 1947, under §205.41, contains the following note: "This section includes such persons as absent treatment healers, astrologists, character readers, fortune tellers, *hypnotists*, mediums, mental healers, palmists, phrenologists, clairvoyants, etc." (Emphasis supplied.) This note indicates that prior to 1947 the comptroller adopted a regulation that included



hypnotists as within the purview of "every person engaged in any occupation of a similar nature" as provided for in the statute. Inasmuch as there have been several sessions of the legislature since the inclusion of hypnotists, under §205.41, supra, by regulation of the comptroller, without indication of legislative disapproval thereof, I believe we can assume that the legislature acquiesced in such interpretation by the comptroller. Thus, this ruling of the comptroller comes within the premise of law as outlined in *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788, and *Green v. Stuckey's of Fanning Springs*, 99 So. 2d 867, in which the court stated the rule as follows:

While not necessarily controlling, as where made without the authority of or repugnant to the provisions of the statute, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction "except for the most cogent reasons, and unless clearly erroneous."

In adopting this regulation the comptroller doubtless had in mind the practice of hypnotism in the field of entertainment where the hypnotist exhibits his art theatrically rather than practices it medically.

The American medical association has passed a resolution recognizing medical hypnotherapy as a proper form of medical treatment. The Dade county medical association has adopted a resolution requesting the universities of Miami and Florida to begin postgraduate instruction in the field of medical hypnosis. The file which accompanies the request for opinion reveals that the medical profession generally recognizes hypnotism as a legitimate form of medical treatment.

Properly construed, the regulation of the comptroller does not include the science of hypnosis, which has been recognized by the medical profession as a legitimate area of medical teaching and treatment, nor does it include the teaching of this science. His regulation covers only the entertainment phase of hypnotism.

Subject to the distinction outlined above, your question is respectfully answered in the negative.

059-27—February 5, 1959

#### TAXATION

DOCUMENTARY STAMP TAX—ASSIGNMENTS OF WAGES—  
WAGE DEDUCTION AUTHORIZATIONS—§201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are assignments of wages by members of the brotherhood of railroad trainmen, in this state, to such brotherhood, for the purpose of paying periodic dues, assessments and insurance premiums, subject to documentary stamp taxes under §201.08, F. S.?

It appears that the above question resolves itself into the basic problem of the interpretation of the intended scope of the legislature in enacting §201.08, F. S.

Section 201.08, F. S., provides: "On promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages and other compensations, made, executed and sold



or transferred in the state, and for the renewal of same, on each one hundred dollars of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. . . ." (Emphasis supplied.)

The supreme court of Florida in *Metropolis Pub. Co., et al., v. Lee*, 170 So. 442, (1936), said: "The statute levying and imposing an excise tax on documents. . . must be strictly construed and all doubts and ambiguities resolved in favor of the taxpayer. The statute was intended to create a selective tax applicable to a class of instruments recognized by law merchants as particularly susceptible to imposition of a documentary tax, and was not intended to be all embracing and cover every kind and grade of commercial instrument."

In 1937, the supreme court of Florida again said, in *Lee v. Quincy State Bank, et al.*, 173 So. 909, that if doubt exists regarding liability of the instrument to taxation, construction is in favor of exemption since the tax cannot be imposed without clear and express words.

A close analysis of the document which purports to be the assignment of wages is necessary to determine whether the instrument is, in fact, such an assignment as is contemplated by this statute.

The instrument to be executed by the railroad employees is captioned, "Wage Deduction Authorization," and although the phrase, "I hereby assign" is used, the instrument is nothing more than an express *wage deduction authorization* by which the Florida East Coast railway company is permitted to deduct dues, assessments, and insurance premiums from the wages of employees and remit the same to the brotherhood of railway trainmen in accordance with the agreement appearing thereupon. The portion of the money representing the wages due, or to become due, the employee, is to be withheld each month by the Florida East Coast railway company for the purpose of paying an indicated amount evidenced by a membership deduction list furnished by each lodge of the brotherhood of railroad trainmen to the Florida East Coast railway.

Such procedure by which the brotherhood of railroad trainmen collects its dues is authorized by paragraph 11, §152, title 45, U. S. C., railroad regulations, as a means of expediting the collection of dues by the union rather than impose upon them the additional administrative burden of separately billing and collecting such payments from individual employee members.

The above described transaction appears to be more in the nature of a bailment, an agency and a constructive trust, than as an assignment of wages.

This position is further substantiated by an interpretation of §201.08, F. S., as a whole. The nature of the documentary stamp tax is an excise imposed upon the promise to pay money. (*Plymouth Citrus Growers Assn. v. Lee*, 27 So. 2d 415, (1946)). In every other instance the documentary stamp tax applies to instruments and documents evidencing a binding indebtedness or obligation, such as a mortgage debt.

The instrument in question is not a written assignment of salary within the meaning of the statute. It does not indicate a debt and is not a promise of a payment of a debt.

The documents mentioned in the statute as to be taxed "10 cents for each \$100 of the indebtedness or obligation evidenced thereby" are instruments which by themselves directly represent a debt or monetary obligation of a fixed or certain amount.

In *U. S. v. Isha*, 21 L. Ed. 728, the rule was laid down that "the liability of an instrument to a stamp duty, as well as the amount of such duty is determined by the form and face of the instrument and cannot be affected by proof of facts outside of the instrument itself."

This assignment on its face is not a direct obligation to pay money but rather an authorization for the railroad to pay the amount of each employee's dues to the brotherhood of railroad trainmen. No one can tell from the face of the paper what amount of money, if any, will become due under the agreement. If one should at the execution of the instrument attempt to stamp it, he could not tell the amount of stamps to be affixed. As a legal term, "obligation" originally meant a sealed bond, but it now extends to any certain written promise to pay money or do a specific thing. In statutes relating to the assignment of wages, the payment of an obligation or indebtedness usually refers to a direct written promise to pay a stated sum and not to the duty to pay that which may be established by proof of extrinsic facts.

Further, it appears that a distinction should be made between an assignment for a consideration passing from a third party, such as a loan, a mortgage debt, or payment of a bill, and one where there is in reality no consideration passing. Here the purported assignment is no more than a direct means of payment to a third party as a matter of convenience, rather than have the employee receive his monthly check and personally pay a portion thereof to the brotherhood of railroad trainmen. Such an agreement is not in any true sense a commercial transaction within the contemplation of the statute.

It appears that there exists no material difference between such a deduction as this and deduction agreements for pension funds, unemployment benefits, savings bonds, etc., which agreements have not been held subject to such tax.

Therefore, I conclude that the agreement evidenced by the instruments attached to your original request does not in fact constitute an assignment of wages within the intent, meaning and scope of §201.08, F. S., and consequently is not subject to the Florida documentary stamp tax.

In light of the foregoing, your specific question is answered in the negative.

059-28—February 5, 1959

#### COURTS

COUNTY JUDGE—COMPENSATION AS JUVENILE JUDGE  
WHEN ASSIGNED—§§1, 2 AND 12, ART. V., STATE CONST.;  
§§39.01, 39.18(2)(c) AND 39.18(5), F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. When a resident county judge who is also the judge of the juvenile court in his county is temporarily unable to perform his duties and a county judge from a neighboring county is assigned by the chief justice of the Florida supreme court to act in place of the resident judge, is the salary provided by §39.18, F. S., for the judge of the juvenile court in the resident judge's county payable to the resident judge?

2. Is the assigned judge entitled to receive compensation for the performance of the resident judge's duties as judge of the juvenile court in addition to his compensation as judge of the juvenile court in his home county?

AS TO QUESTION 1:

In counties where no separate juvenile court has been established, the county judge's court is the juvenile court. (§39.01, F. S.) I understand that this is the situation involved in your inquiry and that the resident county judge is also the juvenile court judge for that county. As the judge of the juvenile court, the resident county judge is entitled to a salary in addition to any compensation that he receives as county judge. (§39.18(5), F. S.) This salary is paid to him by the board of county commissioners of his county pursuant to §39.18(2)(c), F. S., which provides:

(2) Out of the juvenile court fund the board of county commissioners of each county may pay such annual salaries to the judge as shall not exceed the amounts specified in this subsection, in twelve equal monthly payments, and in the case of a district juvenile court, each county paying only its proportionate share of such salary.

(c) In counties or districts having a population of at least 51,000 but not exceeding 200,999, the judge may be paid an annual salary not exceeding an amount equal to forty-six hundred dollars plus twenty dollars for each full 1,000 population over 50,000 in the county or district.

The judge of the juvenile court is a constitutional officer. (Fla. Const. §§1, 12, Art. V.) The salary allowed the county judge by the above quoted sections is received by him for holding that office pursuant to the constitutional provision. The right of an officer to the compensation incident to his office is not impaired by his occasional or protracted absence from office or his temporary incapacity to perform the duties of that office. *Hanchey v. State*, 52 So. 2d 429 (Fla. 1951); *Edwards v. Jacksonville Coach Co.* 88 So. 2d 543 (Fla. 1956); see also, 67 C. J. S. (Officers, §83) pp. 320-322.

In view of the above stated authorities, it is my opinion that the resident county judge is clearly entitled to his salary as judge of the juvenile court *as long as he continues to hold that office, even though he may be temporarily unable to perform his duties.*

AS TO QUESTION 2:

The county judge from the neighboring county was temporarily assigned to act in place of the resident judge by the chief justice of the Florida supreme court pursuant to §2, Art. V, of the Florida constitution, which provides:

*Administration.* The Chief Justice of the Supreme Court is vested with, and shall exercise in accordance with rules of that court, authority to temporarily assign . . . , and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction . . ." (Fla. Const., §2, Art. V.)

It is my understanding that this assignment was valid under the above quoted constitutional provision, as the assigned judge was both the county judge and the judge of the juvenile court

in his home county. The fact of assignment imposed additional duties upon him as a judicial officer. In this state the duties of a public officer may be exacted without specific compensation (*State v. Fussell*, 157 Fla. 55, 24 So. 2d 804 (1946); *Gavagan v. Marshall*, 160 Fla. 154, 33 So. 2d 862 (1948)). Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the performance of such services is deemed to be gratuitous. *Rawls v. State*, 98 Fla. 103, 122 So. 222 (1929).

In view of the above stated authorities, and as no compensation is provided by law for an assigned juvenile judge, it is my opinion that such assigned judges perform those additional duties without compensation. The question of assigned judge's compensation as acting county judge is dealt with in A. G. O. 057-372, Nov. 27, 1957, and, therefore, is not treated here.

059-29—February 6, 1959

#### JUDICIAL DEPARTMENT

JUDGES—MANDATORY RETIREMENT—ART. V AND §17  
AND 26(13) OF ART. V, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are the provisions of subsection (13) of §26, Art. V, State Const., limited to those judicial officers and the offices held by them on July 1, 1957, or do said provisions extend to officers holding office on said date, but who assume judicial office, or other judicial office, subsequently?

Article V (the judicial article) State Const., was revised and amended at the general election in 1956, effective July 1, 1957. This amended article replaced all of former Art. V, and superseded any other provisions of the state constitution in conflict therewith. Section 17, of Art. V, provides in part that "all justices and judges shall automatically retire at age 70"; however, subsection (13), §26, of said article provides that "the provision for automatic retirement in §17, of this article, does not apply to *any person now holding office.*" (Emphasis supplied.) Doubtless this latter provision speaks as of July 1, 1957, the effective date of the amendment.

The above phrase "any person now holding office," under a broad construction might be held to extend to any officer, whether judicial or otherwise, holding office on July 1, 1957, who might thereafter assume judicial office. Under a more limited construction, it might be held to extend to any person holding judicial office on July 1, 1957, but who thereafter assumed another or other judicial office; for example, a person holding office as a county judge on July 1, 1957, but who assumed office as a circuit judge subsequent to said July 1, 1957. Under a strict construction, it could be held that for a person to be within the exception he must have been holding a judicial office on said July 1, 1957, and continued to hold the same office until he was 70 or more years of age.

We have examined the proceedings of the Florida Judicial Council for indications of what may have been intended by the membership when the proposed article was drafted and sub-



mitted to the legislature. We find on p. 4 of the council's 4th annual report, of June 30, 1957, a statement that under the proposed article "members of the judiciary first assuming judicial office after June 30, 1957, are required to retire at the age of seventy." This expression seems to exclude nonjudicial officers holding office on July 1, 1957. From an article appearing in the Florida bar journal of 1956 (pp. 490 and 491), we find, after a comment of a need for mandatory retirement of judicial officers, that "the basic provision for the proposed amendment . . . (provides) compulsory retirement at age 70 of all justices and judges of all Florida courts except those now in office." It is further provided by the amendment that provisions of eligibility for office "shall not affect the right of any incumbent in office to continue in office or to seek re-election. The amended article does not "disturb the terms of incumbent judges" holding office on its effective date. A practical, as well as a literal, reading of the entire amended article indicates that only those judges holding office on the effective date of the amendment and who continue to hold that office, but not those transferring to other judicial offices, until they reach the age of 70 are exempted from the mandatory retirement provisions.

The purpose of the mandatory retirement provision doubtless is to prevent persons becoming incompetent because of age to continue to hold judicial office long past their usefulness as judicial officers. If the compulsory retirement age is equitable and to the best interest of the public, then a strict construction would seem to be one in the interest of the public when considered generally. Although persons often retain their usefulness long after they attain 70 years of age, others have lost their usefulness by, and sometimes before, they have reached the age of 70. We feel that the purpose and intent of the constitution in requiring the retirement of judicial officers by age 70, and a study of Art. V, State Const., as a whole, indicate an intention to limit the operation of subsection (13), §26, Art. V, State Const., to persons holding judicial office *upon* the effective date of the amendment and who continue to hold the same office until they attain the age of 70 or beyond without assuming any other judicial office.

We, therefore, hold that the provisions of subsection (13), of §26, Art. V, State Const., are limited to those judicial officers holding a particular judicial office on the effective date of the amendment and who continue to hold *the same judicial office*. It is not applicable to persons who assume judicial office after the effective date of the amendment, including those judicial officers who, after July 1, 1957, have assumed other judicial office. Although the above conclusion appears to us to be a reasonable one and the proper one, we nevertheless recognize that other constructions of the said subsection (13), §26, Art. V, State Const., are possible, and that courts might reach another conclusion, and, therefore, suggest that the advisability of clarification by a proceeding for declaratory decree should a final answer to the question be desired.



059-30—February 6, 1959

### SHERIFFS

COMPENSATION—FEES FOR CARRYING OUT WRIT OF NE EXEAT—CH. 57-368, §§30.47-30.54 AND 62.18-62.21, F. S.

To: *John A. Madigan, Jr., Attorney, Florida State Sheriffs Ass'n Tallahassee*

### QUESTION:

Are the expenses incurred by a sheriff in carrying out the orders of a court of equity concerning a writ of ne exeat properly chargeable as civil fees under the provisions of Ch. 57-368?

Your question has been prompted by the passage of Ch. 57-368, familiarly known as the sheriffs' budget law, which effectively precludes a sheriff affected by the act from collecting criminal fees. He is not, however, precluded from collecting those fees which are civil and collectable from individuals as distinguished from the county (§30.51, F. S.).

The writ of ne exeat originated in the early common law as a prerogative writ whereby the king could command any man not to go beyond the seas or out of the realm. It was, however, early extended to use by courts of equity in civil actions (30 Am. Jur., Ne Exeat, §2 p. 619). Its purpose today is to restrain a person from going beyond the jurisdiction of the court until he has satisfied the plaintiff's claim or given bond for the satisfaction of the court's decree (Pan Am. Surety Co. v. Walteson, 44 So. 2d 94, 38 Am. Jur., supra).

The writ and the requirements for its issuance are provided for in §§62.18-62.21, F. S. The supreme court has stated that a writ of ne exeat is purely a civil writ (State ex rel Perky v. Browne, 105 Fla. 631, 142 So. 247). Since it is issued by a court of equity and is expressly granted in order to assure the plaintiff that the court will retain jurisdiction over the defendant in order to grant the relief sought, the expense of serving the writ and producing the defendant before the court is a civil cost which should be paid by the individual requiring the writ, or as directed by the court.

Your question is answered in the affirmative. That is to say, the sheriff is entitled to the fees provided by law for services performed in connection with executing the writ of ne exeat.

059-31—February 6, 1959

### PUBLIC HEALTH

PUBLIC HEALTH OFFICERS—LIABILITY—§381.081, F. S.

To: *Dr. Wilson T. Sowder, State Health Officer, Florida State Board of Health, Jacksonville*

### QUESTIONS:

1. To what extent are public health officers employed by the state board of health immune to suit for damages when acting within the scope of their legal authority and official duties?

2. Under the above circumstances, to what extent would liability insurance with a waiver of immunity provision give added protection, if any, to the public health officers?

3. In case of suit against a public health officer, what legal representation could he expect the state to furnish, either from the attorney general's office or the state board of health?

The preservation of the public health is one of the duties devolving upon the state as a sovereign power. In fact, among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. The enactment and enforcement of health measures find ample support in the police power which is inherent in the state and which the latter cannot surrender.

In 25 Am. Jur. 295, §16, we find the following:

The general rule is that incorporated boards of health which are invested by statute with functions of a public nature, to be exercised for the public benefit, are not liable for injuries resulting from the performance of their official duties in the promulgation and enforcement of health regulations, so long as they act within the limits of their authority and discretion, in the absence of any statutory provision imposing such liability. . . .

25 Am. Jur. 297, §17, provides, among other things:

In accordance with established principles governing the liability of public officers for injuries inflicted in connection with the performance of their official duties, the general rule is that members of boards of health and health officers are not personally liable for injuries resulting from an erroneous exercise of their judgment or discretion where they act in good faith, within the limits of their authority. The rules exempting them from liability are not, however, extended so as to relieve them when they act without the scope of their authority or act with negligence amounting to malice. So, health officers are personally liable if, in enforcing quarantine, or other health regulations, they do their work negligently, thereby causing unnecessary damage, or if they act unreasonably, arbitrarily, or maliciously. . . . (Emphasis supplied.)

In *Forbes v. Board of Health*, 9 So. 862, the supreme court of Florida said:

County boards of health are corporate bodies, invested by statute with functions of a public nature, to be exercised for the public benefit, and, in the absence of such remedy conferred by statute, are not liable in an action of tort for damages in the performance of an official duty. . . .

Independent of the provision making county boards of health bodies corporate, with power to sue and be sued, there is nothing in the statutory provisions in reference to them giving the right of action in tort for damages, or indicating a purpose on the part of the legislature to subject them to such suits. As we have already seen, the right alone to sue and be sued cannot be construed to give such remedy. These boards are created for public purposes in the exercise of the police power of the state, and they have no corporate interest in the execution of the powers given them. . . . It is not charged that defendant acted

maliciously or willfully, or otherwise, for aught that appears in the declaration, than in the discharge of a supposed public duty. An examination of the authorities and the principles governing such cases leads us to the conclusion that defendant was invested with public functions, and the duties it owed were to the public, and as such it comes within the sphere of public functionaries, exempt from liability in tort, unless such remedy has been provided by statute. As we have seen, no such remedy has been provided by statute, and the declaration shows that plaintiff is pursuing this course.

Section 381.081, F. S., provides:

The authority, action and proceedings of the board and the state health officer and *other agents of the board* in enforcing the rules and regulations adopted by the board under the provisions of this chapter shall be regarded as judicial in nature and treated as *prima facie* just and legal. (Emphasis supplied.)

In 43 Am. Jur. 85-86, relating to public officers, we find in §273, among other things:

As a rule, a public officer, whether judicial, quasi-judicial, or executive, is not personally liable to one injured in consequence of an act performed within the scope of his official authority, and in the line of his duty. In order that acts may be done within the scope of official authority, it is not necessary that they be prescribed by statute, or even that they be specifically directed or requested by a superior officer, but it is sufficient if they are done by an officer in relation to matters committed by law to his control or supervision, or that they have more or less connection with such matters, or that they are governed by a lawful requirement of the department under whose authority the officer is acting. . . .

The protection extends only to acts done in the line of official duty. Therefore, if an officer, even while acting under color of his office, exceeds the power conferred on him by law, he cannot shelter himself under the plea that he is a public agent. Neither an officer nor an agent can properly be said to have acted under color of a law which gave neither him nor any other person authority to do the act in question; . . .

43 Am. Jur. 89-90, §277, provides, among other things:

It is a general rule that an officer—executive, administrative, quasi-judicial, ministerial, or otherwise—who acts outside the scope of his jurisdiction and without authorization of law may thereby render himself amenable to personal liability in a civil suit. If he exceeds the power conferred on him by law, he cannot shelter himself by the plea that he is a public agent acting under color of his office, or that the damage was caused by an act done or omitted under color of office, and not personally. In the eye of the law, his acts then are wholly without authority. . . .

In 43 Am. Jur. 71-72, §254, we find, among other things:

When power or jurisdiction is delegated to any public officer over a subject matter, and its exercise is confided to his discretion, the acts done in the exercise of the authority are, in general, binding and valid as to the subject matter.

The only questions which can arise between an individual and the public, or any person denying their validity, are power in the officer and fraud in the party . . . *An officer can, however, bind his government only by acts which come within the just exercise of his official powers and within the scope of his authority. . . .*

Unless duly authorized by law, a board or officer may not waive the state's immunity from suit; . . . (Emphasis supplied.)

In 43 Am. Jur., §289.5 (see supplement, p. 12), we find, among other things:

In a number of states there is legislation conferring personal immunity on public officers or employees for acts done in the course of their duty. This legislation is of various types, such as statutes . . . restricting the right to bring suit against members of the board of health; . . . (Emphasis supplied.)

In *Valentine v. Englewood*, 76 N. J. L. 509, 19 L. R. A. 262, it was held that a statute forbidding suit against the members of a board of health, its officers or agents, on proceedings had by them to abate and remove a cause of disease, unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the public health, did not infringe constitutional provisions, private property and individual liberty.

On the question as to the degree of care required to be exercised by a public health officer in the practice of his medical profession, it would seem immaterial whether his services are performed as incidents of a salaried position in a public health clinic or as one practicing his profession independently. The fact that a physician or surgeon renders his services gratuitously does not absolve him from exercising the care, skill, diligence and methods approved and recognized by his profession (48 C. J. S. 1119, §106; see also A. G. O. 049-473).

Replying to question 1, it appears that public health officers are subject to suit for malpractice or for acts committed *beyond* the scope of their legal authority in the same manner as though they were practicing independently their profession as physicians and surgeons. However, by the same token, the public health officer would not be liable for legal acts committed *within* the scope of his official authority.

Acts of an official unauthorized by the laws of the state, although done in the name of the state, are individual acts for which he alone in his individual capacity, and not the state, is responsible.

Replying to question 2, liability insurance would give an additional protection to that afforded by sovereign immunity. It would insure against suits based on malpractice or negligence and against suits based upon torts committed in the course of activities beyond the scope of public health officers' official duties, but done under color of their office. This would be the result unless the provisions of the policy of insurance otherwise stipulated.

There is further consideration that sovereign immunity from suit is being constantly restricted by judicial interpretations of the doctrine. For instance, *Suwannee County Hosp. Corp. v. Golden*, 56 So. 2d 911, in which a public hospital was held liable for the negligence of an employee acting in the scope of official duties; *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, in which a mu-



municipality was held liable for negligence of a policeman acting in the scope of his official duties. In the Suwannee county case the restriction was based on the fact that the injured patient was paying for the hospital services. In the Cocoa Beach case the restriction was based on the distinction between legislative and judicial functions as opposed to other functions of government, immunity not extending to other functions of government. It is not inconceivable that the doctrine of immunity might in some future case be so restricted so as not to cover public health officers.

Two former opinions of this office are noted in passing. In opinion 049-473 this office held that members of the medical staff of the Florida state hospital are subject to suit for malpractice. In opinion 054-167 this office held that the board of control had authority to purchase public liability insurance for the Ringling museum notwithstanding the fact that it is a state agency and probably immune from suit. However, it is my opinion that it would be necessary for the legislature to enact legislation giving the state board of health authority to purchase liability insurance for its public health officers.

Question 2 is answered accordingly.

Replying to question 3, it appears that the state board of health, or the attorney general's office upon the request of the state board of health, might properly furnish legal assistance to a health officer *sued for damages* for acts committed within the scope of his official duties under the following circumstances.

The state board of health should investigate and fully satisfy itself that the health officer has faithfully and efficiently discharged the duties of his office and employment, and that the acts complained of were performed under the direction of the state board of health and the health officer was free of any personal unlawful or tortious conduct in connection with the acts complained of. If such is found to be the case, it is my opinion that the state board of health would then have authority to pay reasonable attorneys' fees incurred in the defense of the action or request legal assistance from the attorney general's office. (See §381.031(3) (e), F. S.; also A. G. O. 047-170.) However, the state board of health is not responsible for any act on the part of a health officer which flows from the exercise of unauthorized powers. (See A. G. O. 048-69; also 049-8 and 051-8.)

It would be manifestly unfair and unjust to the taxpayers of this state for public funds to be expended for private purposes on behalf of state officers or employees who have abused and exceeded the authority of their office or position and, by such abuse and excess, have made themselves personally liable, either civilly or criminally.

The matter, therefore, appears to me to be one for the exercise of the most careful consideration on the part of the state or any of its various agencies, which are contemplating giving financial assistance from public funds in the way of legal counsel to any of its officers or employees who are being sued or prosecuted on grounds that they have wrongfully and unlawfully exceeded and abused the authority of their office or employment. (See A. G. O. 052-320.)

I believe it would be improper for the attorney general's office to undertake to defend a health officer who is *prosecuted criminally*, as in the event of an appeal the attorney general would have to represent the state.

Question 3 is answered accordingly.



059-32—February 6, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS  
CHIROPRACTORS AND NATUROPATHS—DISPENSING PRE-  
SCRIPTION MEDICINE—CHS. 460 AND 462, AND  
§460.11(2) (b), F. S.**

To: Vincent E. Stewart, State Chemist, Tallahassee

**QUESTION:**

Are doctors licensed under Ch. 460, F. S., as chiropractors, and Ch. 462, F. S., as naturopaths, entitled to dispense prescription medicine as a part of their practice under said licenses?

Section 460.11(2) (b), F. S., provides that any chiropractor who has complied with the provisions of Ch. 460 may:

... adjust, manipulate, or treat the human body by manual, mechanical, electrical or natural methods, or by the use of physical means, physiotherapy (including light, heat, water or exercise) or by the oral administration of foods and food concentrates, food extracts, and may apply first aid and hygiene, *but chiropractic physicians are expressly prohibited from prescribing or administering to any person any medicine or drug or from performing any surgery except as hereinabove stated or from practicing obstetrics.* (Emphasis supplied.)

In *People v. Fowler*, 84 P. 2d 326-333, it was held that the words "medicine" and "surgery," as used in the California chiropractic act, were intended to deny chiropractors the use of drugs and medical preparations and the severing or penetrating of the tissues of human beings.

In view of the foregoing it is my opinion that chiropractors may not prescribe or administer any medicine or drug. However, as to the authority of such chiropractor to prescribe or administer vitamins as a form of food, see A. G. O. 056-283 and 051-83.

Replying to your question as it affects naturopathic physicians, it is my opinion that the question was answered in A. G. O. 054-96, 1953-54 Biennial Report of the Attorney General, p. 490. (Said opinion held that naturopathic physicians have the right to prescribe narcotic drugs.) I am assuming that Ch. 462, F. S., 1955, is the law regulating the practice of naturopathy in Florida in view of the recent decision of the Florida supreme court which declared unconstitutional Ch. 57-129, which repealed Ch. 462, F. S., 1955.

059-33—February 12, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS  
OSTEOPATHS—EXAMINATIONS BY THE BOARD OF EX-  
AMINERS—CH. 459, AND §§ 459.05-459.081(1), F. S.**

To: Board of Osteopathic Medical Examiners, Fort Lauderdale

**QUESTION:**

May the state board of osteopathic medical examiners, under the provisions of Ch. 459, F. S., employ a professional examining service to furnish to the board prepared examinations, which examinations would be prepared and graded by the professional examining services and given to applicants for a certificate to practice

**osteopathy in this state, in lieu of the board itself preparing the examination questions and grading the individual examination papers?**

Section 459.06, F. S., sets forth minimum qualifications which a person must have before he can be examined by the state board of osteopathic medical examiners for purposes of being issued a license to practice osteopathy in Florida.

Section 459.07, F. S., sets forth minimum standards of professional education which must be possessed by an applicant as a condition precedent to being permitted to take the examination for a license to practice.

Section 459.08, F. S., defines what is meant by the term "college of osteopathy" and sets forth in detail the courses which must be offered at such college.

Section 459.081(1), F. S., provides:

The state board of osteopathic medical examiners may pass upon the good standing and reputability of any osteopathic school or college and determine those which maintain a standard of training sufficient to admit their graduates to the examinations given by the said board. (Emphasis supplied.)

When these several statutes are considered together, it is obvious that the legislature intended for the board, comprised of the persons appointed pursuant to §459.05, F. S., not only to give the examinations, but also to grade and correct the examination papers and thereafter to determine persons who were eligible to be licensed.

It is my opinion that it would be permissible for the board to subscribe to a professional examination service to supply the board with certain questions from which the board could make a selection as to those questions it wished to propound to the applicants, but the board should be the actual authority giving the examination and grading the papers rather than delegating same to some unauthorized service or agency.

Therefore, your question is answered in the negative.

059-34—February 12, 1959

#### **MOTOR VEHICLE LICENSES**

#### **RECIPROCAL AGREEMENTS FOR NONRESIDENT EXEMPTION—CH. 212, AND §320.39, F. S.**

To: *Florida Railroad and Public Utilities Commission, Tallahassee*

#### **QUESTION:**

In a situation where a transport company, organized and existing under the laws of a foreign state, but authorized by the proper authorities to operate motor vehicles in interstate commerce and which company has been granted a certificate of public convenience and necessity to operate as a common carrier of meats, meat products and other articles distributed by meat packing houses in intra-state commerce in Florida, what effect, if any, will the use of such intra-state certificate have upon the exemption or waivers now enjoyed by such motor transport company with respect to its motor vehicles operating in interstate commerce under the provisions of the fourteen state reciprocal agreement?

The state of Florida, through its proper officials, on December 20, 1957, pursuant to §320.39, F. S., entered into a reciprocal agreement with the State of Georgia and 12 other states, whereby it was agreed in Section VI that motor vehicles licensed by any one of the reciprocating states, including trucks, tractors, trailers and semi-trailers, operated in the transportation of property "for hire" might be operated in the several states without limitation as to the number of trips and without the payment of any motor vehicle fees whatsoever to the reciprocating states *when operated strictly in interstate commerce* with certain exceptions as to identification stickers required by the several states and with certain exceptions as to the purchase of motor fuel peculiar to the individual states and not material to the issue here.

We understand the facts in this case to be that a refrigerated transport company, organized and existing under the laws of Georgia, and whose principal base of operation is Atlanta, Georgia, has been properly certificated to carry on and to operate motor vehicles in interstate commerce and enjoys a rather large operation with respect to interstate commerce; that a meat packing concern in Quincy, Florida, needs the services of a refrigerated transport company to transport its products from Quincy to numerous points and places in Florida, which would be strictly an intra-state operation; that a certificate of public convenience and necessity for such intra-state operation has been issued to the refrigerated transport company, but that no actual operation has thus far taken place, because of the possible effect that such operation might have upon the waiver of taxes and fees now enjoyed by the refrigerated transport company, under the provisions of the aforesaid reciprocal agreement.

This office is of the opinion that the refrigerated transport company may make use of a certificate of public convenience and necessity to operate as a common carrier of meats, packing house products and other articles distributed by packing houses, from Quincy to various points in Florida, without jeopardizing its privileges and immunities under the fourteen state reciprocal agreement involving its interstate operation, if, and only if, the said refrigerated transport company shall designate to the Florida railroad and public utilities commission the specific motor vehicles which it desires to use in the intra-state operation in Florida and that said motor vehicles be licensed and registered in Florida and that at no time will the company transport property in intra-state commerce in this state or commingle Florida intra-state freight with interstate freight on a motor vehicle which has not been first so designated by the transport company. These conditions should be set forth in the intra-state certificate by the Florida railroad and public utilities commission as the issuing authority. Florida mileage tax must be paid on all Florida intra-state movements.

It must be clearly understood that this opinion has no application to Ch. 212, F. S., commonly known as the "Florida sales and use tax act," or to the rules and regulations made pursuant thereto.

059-35—February 17, 1959

**CORPORATIONS AND BUSINESS TRUSTS  
LIMITED PARTNERSHIPS—DISSOLUTION AND REFORMA-  
TION—CH. 620, AND §§620.02(1)(a)-(b)2., AND  
620.25(2), F. S.**

To: *R. A. Gray, Secretary of State, Tallahassee*

**QUESTIONS:**

1. May the secretary of state file a certificate of dissolution of a limited partnership dated Jan. 8 retroactively as of Dec. 31 when the annual filing fee required by §620.02 (1) (a)-(b) 2., F. S., has not been paid?

2. In the event that a limited partnership is dissolved and the general partners thereof are desirous of retaining the same name for another limited partnership consisting of entirely different special partners from the original partnership, should the secretary of state require the signatures of all special partners on the certificate of dissolution of the original limited partnership?

**AS TO QUESTION 1:**

Chapter 620, F. S., the uniform limited partnership law, does not set out the procedure to be followed under the circumstances outlined in question 1. It would, however, as a practical matter, seem appropriate to require the payment of the annual filing fee prior to granting and filing a certificate of dissolution. From the time the certificate of dissolution is granted the limited partnership would cease to exist and to attempt to thereafter collect the current annual filing fee from a non-existent partnership would present an anomalous situation. Therefore as a practical matter, it is suggested that until such time as a court of competent jurisdiction may rule otherwise, you collect the annual filing fee as required by law prior to the issuance of a certificate of dissolution.

Question 1 is answered accordingly.

**AS TO QUESTION 2:**

In the light of §620.25(2), F. S., which provides that "the writing to cancel a certificate shall be signed by all members," it would appear that the certificate of dissolution to be filed in the instant case should also be signed by all members of the partnership in order to comply with the requirements of law.

Question 2 is therefore answered in the affirmative.

059-37—February 19, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS  
NATUROPATHY—MEMBERSHIP OF THE BOARD—§14, ART.  
XVI, STATE CONST., CH. 57-129, LAWS OF  
FLORIDA, AND CH. 462, F. S.**

To: *William L. Durden, Executive Assistant, Office of Governor,  
Tallahassee*

**QUESTIONS:**

1. In view of the recent supreme court decision in the case of *Elsin v. Collins*, Case No. 25.519 which held Ch. 57-129 relating to the practice of naturopathy in

Florida unconstitutional, what is the status of the Florida law regulating the licensing of naturopaths?

2. If Chapter 462, F. S., 1955, is restored to its effectiveness, what is the status of the three Board Members, to-wit:

Julio Gavilla—term expired 1957

Watson A. Walden—term expired, 1958

Charles H. Damsel—term will expire July 15, 1959

It is my opinion that Ch. 462, F. S., 1955, is now the law regulating the practice of naturopathy in view of the supreme court decision in *Elsin v. Collins*, Case No. 25,519, which held the entire chapter 57-129, F. S., unconstitutional.

Section 14, Art. XVI, State Const., provides that all state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified.

In view of the foregoing constitutional provision, it is my opinion that the three members, Julio Gavilla, Watson A. Walden and Charles H. Damsel constitute the state board of naturopathy under Ch. 462, F. S. However, in view of the fact that two of the members' terms have expired, it would be in order and proper for you to make appointments to those two positions.

I trust the foregoing answers your inquiry.

059-38—February 20, 1959

#### CORPORATIONS AND BUSINESS TRUSTS

CORPORATION—AUTHORITY OF SECRETARY TO APPROVE OR DISAPPROVE CORPORATE NAME—§15.13, F. S.

To: R. A. Gray, *Secretary of State, Tallahassee*

#### QUESTION:

Where the secretary of state has granted to a Florida corporation a trademark under the applicable provisions of the Florida statutes, would it then be proper to approve articles of incorporation submitted by a different group wherein the name of the proposed corporation is identical to the previously reserved and currently used trademark?

It is elementary that a trademark is a property right (87 C. J. S. 219-222, Trademarks, §2; 52 Am. Jur. 513, Trademarks, §13; *Smart Shop v. Colbert's*, Tex., 250 S. W. 2d 431). Because of the peculiar qualities which inhere in trademarks, such rights must be protected.

In *Children's Bootery, et al., v. Sutker*, 91 Fla. 60, 107 So. 345, the Florida supreme court held that the incorporation under a previously used trade name of another constitutes an unwarranted invasion of the rights of the original owner of the trade name. Courts of other jurisdictions have also upheld the principle that the interest in a trade name or trademark is to be protected and they have generally held that the original user has priority rights to said protection. (See 87 C. J. S. 261, Trademarks, §27; 52 Am. Jur. 520, Trademarks, §24; *Gano v. Gano*, Ga., 47 S. E. 2d 741; *Henry Furnace Co. v. Cappeleman*, Ohio, 108 N. E. 2d 839). In the *Henry Furnace* case the court said at p. 846:



We have a case where, with all the world to choose from, defendants knowingly adopted as a corporate name, a trade name of peculiar meaning to the particular business which had been developed and enhanced by plaintiff through the years. It was a name become of sufficient value so that defendants apparently hoped to cash in upon it, and to reap where they had not sowed.

We believe the evidence makes out a case of actual competition between plaintiff and defendants, although it is likewise our opinion that proof of actual and direct competition was not required in order to entitle plaintiff to an injunction. The use of another's reputation may be as disastrous as the outright taking of his trade. Modern courts give standing to a name and protect it as a property right.

In this decision the court enjoined the corporation from using as its corporate name that which had been established by another concern as a trade name.

In a recent Florida case dealing with trade names, *Jack Dickson, doing business as Miami Ventilated Awning Shutter Co. v. Paul Rimmeir, doing business as Sea View Ventilated Awning Shutters, Fla.*, 93 So. 2d 82, the Florida supreme court said:

In order to correct the misunderstanding which was fostered by our original opinion, we state that the decree below should be framed so that the injunction and the determination of damages *take into account both the symbols designating the firm and those designating the products of defendant.* (Emphasis supplied.)

The issues in this case and the *Children's Bootery* case, *supra*, decided earlier, are very similar to the instant situation wherein a group proposing articles of incorporation desires to use as a corporate name a trade name previously reserved by another corporation. In both of the cases just referred to the Florida supreme court indicated its disapproval of the policy of allowing corporations to infringe upon the rights of the owners of previously established trade names in businesses of a like nature. In *Sun Coast v. Shupe, Fla.*, 52 So. 2d 805, the Florida supreme court refused to enjoin the subsequent use of a registered corporation name where the initial user was a corporation operating a hotel and the latter user was a firm which had adopted the same caption as its trade name in the totally unrelated business of selling real estate. Such is not however the case here.

In the instant case the trade name presently belongs to a corporation primarily engaged in the chain restaurant and cafeteria business and the group desiring to utilize the trade name as its corporate name plans to open a large restaurant in an area currently served by the trade name owner. Thus, even though there may not be direct competition at the moment, both groups are engaged in the same type of business and there is adequate opportunity for close competition in the future. Under the modern trend in court decisions the *possibility* of such is all that appears to be required to enjoin the second party from infringing upon the previously established trade name rights of the first party. (See 87 C. J. S., 285, 371, 379, Trademarks, §64, Competition Footnote 73, §108 Necessity of Actual Competition, Footnote 12, §109 Necessity of Actual Competition Footnote 66; 52 Am. Jur. 575, 576,

Trademarks, §94, Footnote 7, §97; *Henry Furnace Co. v. Cappeleman*, *supra*).

In your inquiry you made the following comment, "It has been my custom not to file proposed articles of incorporation having the identical name of a trade mark." Based upon the authority set out above it would appear that your policy is well founded in law. In addition, it appears appropriate to point out that the secretary of state is charged by law with the duty of supervising and administering the corporation laws of this state, §15.13, F. S., and is thereby vested with the necessary discretion insofar as administrative rulings relating to the corporation laws of Florida are concerned. Such administrative rulings and interpretations are of considerable persuasive force, *L. B. Smith Aircraft Corp. v. Green*, Fla., 94 So. 2d 832, at 835. *Harvey v. Green*, Fla., 85 So. 2d 829. Regardless of the reasons behind your policy it is persuasive and should be respected until it is overruled by a court of competent jurisdiction. Since the policy of your office, as I pointed out above, seems well founded in law, I am of the opinion that it should not be disturbed and your question is therefore answered in the negative.

In the event that the applicant for the corporate charter in the instant case feels that you are not exercising proper administrative discretion, he will find the checks and balances of the democratic form of government at his disposal and he may bring a mandamus action in the courts to have this matter decided with finality.

059-39—February 23, 1959

#### COURTS

JUSTICE OF THE PEACE—ACCEPTING COURT COSTS IN ADVANCE—CH. 832; §§939.02 AND 939.16, F. S.; §14, D. R., STATE CONST.

To: *George A. Harris, Justice of the Peace, Jacksonville*

#### QUESTION:

Is it legal for the justice of the peace to accept costs from the complainant for the constable and justice of the peace when the complainant wishes to discharge the case?

Under certain circumstances, a justice of the peace is required to obtain payment in advance or security for costs of process, service of the same and of examination. This requirement is provided for under §939.16, F. S.

In interpreting the above-cited statute, the supreme court of Florida has modified the application of this section so as to make it inapplicable to crimes of a public nature. (See *Simmons v. State*, 71 Fla. 34, 71 So. 278; *Osceola County v. State ex rel. Newton*, 115 Fla. 5, 155 So. 119.) In the *Osceola county* case, *supra*, the Florida supreme court held that "any felony must be considered to be a crime of a public nature." Some misdemeanors could also constitute crimes of a public nature. (Compare 1950 A. G. O. 050-290).

Therefore, as to crimes which are not of a public nature, it is not only within the legal power of the justice of the peace to accept costs, but under the purview of §939.16, *supra*, it is his duty to collect said costs or to obtain security for costs prior

to the commencement of the action. (See A. G. O. 057-254.)

In the event the crime is of a public nature, your question must be answered in the negative since there is no legal authorization for your collection of costs. Section 939.02, F. S., authorizes only the collection of costs from a defendant in the event of his conviction. (Buckman v. Alexander, 24 Fla. 46, 3 So. 817. See also, Constitution of Florida, Declaration of Rights, §14; A. G. O. 057-235.)

Your letter indicated that you are primarily concerned with worthless check cases. In an opinion by one of my predecessors (1941 A. G. O. 781), it was stated that the crime of uttering checks with intent to defraud was a misdemeanor and not a crime of public nature. That opinion should be considered in light of the subsequent amendments of Ch. 832, F. S., pertaining to worthless checks, which provides under certain circumstances that a crime under Ch. 832, supra, is a felony. Therefore, the above-stated opinion must be applied in each instance based on the circumstances of the case and after a determination of whether or not the defendant is charged with a crime of a public nature.

059-40—February 24, 1959

#### INSURANCE

#### INSURANCE COMPANIES—APPROVED SECURITIES AS REQUIRED INVESTMENTS—CH. 57-1302, AND §§626.04 AND 635.27, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

#### QUESTION:

**Are the certificates of indebtedness issued pursuant to Ch. 57-1302, approved securities within the purview of sections 626.04 and 635.27, F. S., for the purposes therein provided?**

Section 626.04, F. S., prohibits the licensing of "domestic insurers and surety companies" in this state until they have the required amount "actually invested in bonds of the United States, or any state or of any county or municipality in the United States, or in mortgages or deeds of trust on improved and unencumbered real estate worth not less than fifty percent more than they loaned thereon, at market value, the same to be approved by the insurance commissioner . . ." Section 635.27, F. S., sets out the securities that life insurers must have their funds invested in. The qualified securities under this section are set out in numbered subsections. The certificates of indebtedness issued under said Ch. 57-1302 are clearly not within the purview of subsections (1), (2) and (3) of said §635.27. The credit of the district or county issuing such certificates is not pledged for their payment; therefore they are not within the purview of subsection (4) of said section. The improvements made under Ch. 57-1302 are not "public toll bridges, structures or improvements owned" by the district or county issuing them; therefore not within subsection (5) of said section. They are not issued by a corporation within the purview of subsection (6) of said section. They are not dividend paying stocks; therefore not within subsection (7) of said section. They are not within either sub-

sections (8), (9), (10) or (11) of said section; neither are they under subsection (13) thereof.

This brings us to the only remaining subsection, that is, subsection (12) of said section, which provides in part that, "bonds, notes or other evidences of debt which are secured by first mortgages, liens or deeds of trust on fee simple, unencumbered, improved or income producing real property located in the United States or in Canada. . . ." This brings us to the question of the nature of the liens imposed under and pursuant to Ch. 57-1302; the "separate certificates of indebtedness" issued pursuant to said chapter appear to encumber real property abutting, adjoining and contiguous to the streets, highways, etc., improved under the provisions of the said enactment, as security for the payment of the assessments made under the said enactment. The amounts assessed may not exceed the estimated benefits "accruing to such property by reason of such public improvements." These certificates of indebtedness are required to be "recorded in the office of the clerk of the circuit court" of the county wherein the lands encumbered lie. The special assessments evidenced by the said certificates of indebtedness "remain liens upon the respective lots, parcels or tracts of land against which the assessments are made, from the date of the approval of the resolution providing for such assessments *held in dignity to all other liens*, except for ad valorem taxes, until paid." (Emphasis supplied.) (§6, Ch. 57-1302). The provision just quoted was intended to declare the priority of the lien of the special assessments and certificates of indebtedness above mentioned with other liens and encumbrances against the property. Doubtless the phrase "*held in dignity to all other liens*," above quoted was a typographical error and some other phrase was intended, such as "*superior in dignity to all other liens*" (see §170.09, F. S.; §10, Ch. 20658, 1941, Everglades Drainage Dist.), or words of similar import, such as "prior," "equal," etc. Other words, such as "inferior," for example, might also be substituted for the word "held." We are unable to read the word "held" as "superior," "prior" or words of similar import, because it would also be possible to substitute the word "equal," "inferior," etc., with equal ease for the word "held." We are unable to hold as an absolute fact that only the words "superior," "prior," or words of similar import could only be substituted instead of "equal," "inferior," etc., when the context would seem to admit of the substitution of any of such terms.

In conclusion, we must hold that the certificates of indebtedness issued pursuant to chapter 57-1302 are not approved securities within the purview of §626.04, and, because of the apparent error in §6 of Ch. 57-1302, we are unable to say that they are approved securities under §635.27, F. S., and must also give a negative answer as to this section.

059-41—February 25, 1959

#### BEVERAGE LAW

WINE MANUFACTURER'S LICENSE—ISSUANCE OF—§§561.01 (4), (10), 561.14(1) AND 561.35(1) (k), F. S.

To: H. G. Cochran, Director, State Beverage Department, Tallahassee

QUESTION:

May Schenley Industries, Inc., who is a manufacturer



of distilled spirits in a state other than Florida, and is a manufacturer of wine in California, be granted a wine manufacturer's license in Florida, where the statement of facts stipulated between the state and the applicant, Schenley Industries, Inc., are as stated below?

STATEMENT OF FACTS:

1. The proposed plant of the applicant, Schenley Industries, Inc., will be located at 550 W. 20th St., Hialeah, Dade County, Florida.

2. Eight metal storage tanks of, approximately 2500 gallons will be set up in connection with the bottling line for the purpose of bottling the product.

3. Two refrigerator tanks of 3,000 gallons each will be utilized for the control of the temperature of the wine. These refrigerator tanks will be used to store the product of 14% or less of alcohol by volume until such time as the product is bottled. These refrigerator tanks will also be used for the purpose of stabilization of the product which might otherwise vary because of changes in temperature.

4. No fermenters or rectifying equipment will be installed in the plant.

5. Equipment and all appurtenances necessary for the pumping of the product from railroad tank cars to the storage and refrigerator tanks will be installed.

6. All dry wines will be subject to and will undergo a pasteurization process, and certain wines will be put through this process more than once. Wines other than dry wines will not be subjected to this process.

7. All wines will be subject to a filter cell process and in connection therewith a filtering medium coated with diatomaceous will be used. This filtering and polishing process is normally an essential part of the manufacturing process where the wine is manufactured and distributed from the original manufacturing point. Where the ordinary filtering process is used by bottlers, the product has already been subjected to the filter cell process.

8. The applicant, Schenley Industries, Inc., will not sell or distribute the wine products manufactured in Florida to retail vendors, but will distribute only to wholesale distributors, and the applicant has no interest in wholesale distributors which will purchase wines manufactured by it, other than the usual and normal manufacturer-distributor relationship.

9. The applicant, Schenley Industries, Inc., if granted a wine manufacturer's license, will furnish to the state beverage department all necessary information regarding the receipt, producing, processing, filtering and bottling of all wine so as to acquaint the state beverage department with every detail of the applicant's operation.

10. The applicant, Schenley Industries, Inc., has applied for and received from the federal government a wholesaler's basic permit and a bonded wine cellar's



permit. The application shows that the proposed plant of the applicant need not secure a federal rectifying license or pay rectifying taxes.

The applicant does not propose to sell the wine products produced by it at its Hialeah plant to retail vendors or to anyone other than licensed manufacturers or distributors and since the said applicant holds a manufacturer's license for distilling spirituous liquors in a state other than Florida, and therefore is prohibited from receiving a liquor distributor's license under the provisions of §561.14(1), F. S., and since persons, firms or corporations may be licensed to distribute both liquors and wines, (§561.35(1)(k), F. S.), it is our opinion that the intent, purpose and spirit of the beverage law considered as a whole would prohibit the applicant, or someone standing in the same position, from selling its wine products produced in Florida to anyone other than another manufacturer or to a licensed distributor, notwithstanding the provision of §561.14(1), F. S.

The processes to be carried on at said plant i.e., filtering, clarifying, purifying, removal of cloudiness, precipitation, elimination of undesirable odors or flavors, are processes authorized to be carried on by the federal government on bonded wine cellar premises and such processes, while not fermentation processes, are an integral part of manufacturing processes and things which must be done prior to producing a salable product.

Section 561.01(10), F. S., provides:

The term "manufacturer" shall mean all persons, firms or corporations who make alcoholic beverages by distillation, the fermentation of fruits, the brewing of brews or other known processes, and shall extend to and include persons licensed under this law; . . .

Subsection (4) of said section, provides:

The term "wine" as used herein shall extend to and include all beverages made from fresh fruits, berries or grapes, either by natural fermentation or by natural fermentation with brandy added, in the manner required by the laws and regulations of the United States. . . .

When these two sections are construed together, as they must be, it would seem that a manufacturer of wine is a person who makes wine by the fermentation of fruits or other known processes in the manner required by the laws and regulations of the United States.

The United States government has issued to the applicant, Schenley Industries, Inc., a wholesaler's basic wine permit for Florida and a bonded wine cellar permit. Federal regulations with reference to the establishment of bonded wine cellars and what may take place on bonded wine cellar premises are:

Title 26, U. S. C., §240.120:

*Bonded wine cellars.* Every person desiring to produce, blend, cellar treat, store, bottle or package untaxed wine (other than cider, family wine or experimental wine produced free of tax under §5042, I. R. C., and Subpart Y of this part) shall provide premises, make application, file bond and receive permission from the assistant regional commissioner to operate a bonded wine cellar.

Title 26, U. S. C., §240.130:

*Activity on bonded wine cellar premises.* Except as authorized in this subpart, bonded wine cellar premises must

be used exclusively for the production, blending, cellar treatment, storage, bottling, packaging, and removal of wine (including distilling material, vinegar stock, heavy bodied blending wine, Spanish type blending sherry, and similar wine products made from fruit, with or without added wine spirits, and without added sugar) and no materials, liquids, or liquors other than those authorized to be used in such production, etc., may be produced, received, or stored on the bonded premises. . . .

Subject to the conditions heretofore cited, it is my opinion that a wine manufacturer's license may be issued to the applicant, Schenley Industries, Inc.

059-42—February 25, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—SHORTAGE IN ACCOUNTS—§§122.08  
(8), 122.10, 122.15 AND 216.24, F. S.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**May an officer or employee under the state and county officers and employees retirement system, who is short in his public accounts, assign any funds in his contribution account for the purpose of making good his shortage?**

The employee in question was employed by one of the county officers as bookkeeper and auditor and while so employed there developed in his accounts a shortage in his accounts far in excess of the accumulated contributions to his credit in the state and county officers and employees retirement system. It is evident that this shortage is in excess of any bond he may have had up with his employer (the county officer). The effect of the shortage appears to have been a shortage of county funds, at least in an amount in excess of the accumulated contributions. Although the employer, a county officer, may be liable for the shortage under the laws of agency, at least in equity the employee is also liable to the county for the shortage. The said employee is therefore short in his accounts to the county occasioned by what amounts to an embezzlement.

The said employee has by written document, signed and acknowledged by him, assigned "the funds deposited with the comptroller in my retirement fund," to his employer, the county officer above mentioned. There is evidence in the record before us that the employee has less than 10 years creditable service in the retirement system; for the purposes of this opinion we shall presume that such is the case. Section 122.10, F. S., provides that "should any officer or employee leave the service of the state before accumulating aggregate time of ten years toward retirement, such officer or employee shall be entitled to a refund of one hundred per cent of his contributions made to the retirement fund without interest . . ." Under §122.15, F. S., "the accumulated contributions" of members of the said retirement system "shall not be subject to execution or attachment or any legal process whatsoever and shall be unassignable." (Emphasis supplied.) The assignment in question seems to be prohibited by said §122.15, F. S., unless within some exemption therefrom.

Section 122.08(8), F. S., provides that "no state or county official or employee who has a shortage in his accounts, *as certified by the state auditing department*, may retire or receive any benefits under this chapter so long as such shortage exists." (Emphasis supplied.) So far as we are able to ascertain from the file before us the shortage has not yet been officially "certified by the state auditing department." Although the above subsection and section of the statute prohibit the officer or employee receiving "benefits under" the retirement system "so long as such shortage exists," there is not found in the said statute, or any other statute so far as we are advised, any right in the state or county, or any state or county officer, to demand and receive the contributions of the employee short in his accounts toward payment of such shortage.

Although there is a general rule of law that neither the government nor its agencies is to be considered within the purview of a statute unless an intention to include them is clearly manifest (82 C. J. S. 554-558, §317) there is some authority that this rule may not apply to statutes granting exemptions, although the adverse rule is followed by some (35 C. J. S. 116-118, §85). If assignments of an employee's contributions under the retirement statute are to be recognized the same should be pursuant to court order and not an opinion of this office; this because of the uncertainty of the status of applicable laws.

We, therefore, must, for the purposes of this opinion, answer the above stated question in the negative. It is not necessary that we consider §216.24, F. S., at this time and whether an assignee may be deemed the "ultimate beneficiary" thereunder.

059-43—February 26, 1959

#### MUNICIPALITIES

SAFETY CODES—RIGHT TO ADOPT AND PUNISH VIOLATORS—§1, ART. V. STATE CONST.; CHS. 165-186 AND §§165.19, 165.191, 168.01-168.04, AND 440.56, F. S.

To: *Burnis T. Coleman, General Counsel Florida Industrial Commission, Tallahassee*

#### QUESTIONS:

1. May a city by ordinance adopt safety codes provided for under the provisions of §440.56, F. S.?

2. Do municipalities have the authority to arrest and prosecute violators of safety codes enacted under the provisions of §440.56, F. S.?

#### AS TO QUESTION 1:

In Florida all municipalities are creatures of legislative enactment, whether they be organized by a special act or the general law relating to cities and towns, as set out in Chs. 165 through 186, F. S. In all instances municipalities have authority to enact local ordinances, and I know of no instance where a Florida municipality is without authority to enact ordinances relating to public safety. Municipalities created under the general law derive this authority from §165.19, F. S. Those cities created under the provisions of the general law, and those cities whose charters permit reference to the general laws may enact published codes and rules by reference to title only, under the provisions of §165.191, F. S. The Florida supreme court has held that the general power to enact ordinances under the pro-

visions of §165.19, F. S., clothes municipal governments with enough authority to create by ordinance an offense against municipal laws out of the same acts that already constitute an offense against the state law (*State v. Quigg*, 154 Fla. 448, 17 So. 2d 697). This same theory has been held to apply to municipalities established by special act of the legislature. In *Orr v. Quigg*, 135 Fla. 653, 185 So. 726, decided in 1938, the Florida supreme court ruled that a city of Miami ordinance which was entitled "An ordinance to forbid and punish any act within the city limits which shall be recognized by the laws of Florida as a misdemeanor" was valid. In this case the general powers which Miami had to enact this ordinance were similar to those set out in §165.19 of the general statutes and with proper legislation this authority can be given to any city in this state.

Based on the authority set out above, question 1 is answered in the affirmative. In addition municipalities may also adopt by reference or otherwise ordinances which parallel the provisions of state statutes. In the case of §440.56(2) through (10), F. S., "city or appropriate agency thereof" should probably be substituted for the words "commission" or "industrial commission" as they now appear therein.

#### AS TO QUESTION 2:

In the event that the municipalities adopted the statutes and codes discussed in question 1 above as ordinances, then the violators thereof could be punished in a municipal court in the municipalities established under the general law. This authority stems from the provisions of §1, Art. V, State Const., and §§168.01 through 168.04, F. S. In those municipalities established by special act of the legislature, the authority stems from §1, Art. V, State Const., and the applicable municipal charter provisions.

Those offenses which are violations of the state statutes as opposed to municipal ordinances would be tryable in the state courts. The Florida supreme court has, however, held that the conviction or acquittal in a municipal court under a municipal ordinance provision is not necessarily a bar to trial in a state court for the same offense made punishable by general statutes (*Theisen v. McDavid*, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; *Hunt v. City of Jacksonville*, 34 Fla. 504, 16 So. 398; 43 Am. St. Rep. 214, and *Bueno v. State*, 40 Fla. 160, 23 So. 862). Therefore, if a municipal court convicts a person for violation of an ordinance which is identical to the state law the same person can again be tried in a state court for violation of the state law arising out of the same act.

Your second question is answered accordingly.

059-44—March 2, 1959

#### TAXATION

#### DOCUMENTARY STAMP TAXES—MOTOR VEHICLE DEALER FINANCING— §201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

What documents and instruments, if any, used in connection with motor vehicle dealer financing are subject to our documentary stamp taxing statutes?

The usual practice in this connection is for the motor vehicle



dealer to enter into an arrangement with a bank or other financial institution for a line of credit, not to exceed a fixed amount at any one time. To accomplish this, usually the motor vehicle dealer executes his promissory note in the amount of the line of credit granted under the arrangement. This note may or may not be upon a collateral form of note, payable upon demand. The principal due the bank or other financial institution at any given date is determined, not by the face of the note, but by the amount actually advanced by the bank or financial institution under the arrangement, less any payments or collections on account. This promissory note is secured by *trust receipts* delivered by the motor vehicle dealer to the bank or other financial institution from time to time.

The trust receipt usually used here is a security transaction designed to aid in financing retail dealers of domestic goods who do not have sufficient resources to finance the purchase of merchandise, and who may be unable to acquire credit except through the utilization of the merchandise purchased as collateral. It is akin to accepted types of security devices, such as the chattel mortgage, the conditional sale, and the pledge, being designed to meet more effectively the peculiar financing problems of the retail dealer than is possible under the older forms of security devices mentioned (53 Am. Jur. 961, §1). "In domestic transactions the usual trust receipt involves three parties: (1) a dealer in goods for resale who receives possession of the goods, either directly from a manufacturer or distributor, or on a bill of lading consigned to a bank or finance company; (2) a manufacturer or distributor who sells goods to a bank or finance company which does not intend to use them but to turn them over to the dealer; (3) a bank or finance company which advances money or credit for the purchase of the goods, receiving title from the manufacturer or distributor and taking from the dealer a statement that he holds the goods in trust for the bank or finance company" (53 Am. Jur. 961-2, §3). It is contemplated that the dealer will sell the goods and repay the bank or finance company, and that the ultimate buyer or user will obtain title.

We have examined the trust receipt copies handed us with the request for opinion and find that they, after making reference to the promissory note above mentioned evidencing the extent of the financial credit granted, "pledge, assign, transfer and sell to the entruster (bank or finance company)" the chattels described in such trust receipts. "This transfer and sale is made for the purpose of creating a security interest in the entruster... to secure to the entruster the prompt repayment" of the advances made under the financing agreement between the motor vehicle dealer and the bank or finance company. These trust receipts do not appear, within themselves, *to be obligations to pay money*; they are mere *security instruments*. The obligation to pay money is that contained in the written finance arrangement or the promissory note made and delivered in connection therewith. These trust receipts in a way serve in the nature of warehouse receipts for personal property although issued by the person in possession with a right of sale instead of a warehouseman. In case of default the bank or finance company may take possession of the property covered by the trust receipt and sell the same to satisfy the dealer's indebtedness under the financing arrangement. Although not a warehouseman's receipt, trust receipts bear some relation thereto. In our study of the "trust receipts" we have not considered the



form of note thereto attached as being a part of the trust receipt, but as a separate instrument, when executed, evidencing an obligation to pay.

The written obligation of the motor vehicle dealer to the bank or financial institution is the financing contract or the promissory note or notes made and delivered in connection therewith, which are given to secure the payment of balances from time to time due the bank or finance company from the motor vehicle dealer. The promissory note, as well as the financing contract, contemplates an obligation to pay money not to exceed the sum named therein. The written obligation assumed under the contract and promissory note may or may not equal the obligation named in the promissory note and the finance contract. The obligation seems to change from time to time as the obligation of the dealer to the bank or financial institution changes.

The collateral agreement considered by us in our opinion of December 11, 1953 (053-327; 1953-4 Biennial Report 269) did not within itself constitute any written obligation to pay money, although there probably was an implied obligation to repay the moneys advanced under the terms of the agreement; however, no sum certain was set out in the agreement or contract. The agreement there involved was nothing more than an executory contract to make a loan or to advance moneys when requested. Each advance of money made under the agreement was a loan of money. The instrument there given the bank for the advance of money, when read in connection with the collateral agreement, constituted an agreement to pay. Here the agreement between the customer and the bank is for the establishment of a line of credit, in an amount not exceeding \$300,000 or other specific amount, secured by trust receipts then to be delivered, as well as to be delivered in the future. As soon as the credit was established the account was subject to the check of the customer so long as the financial arrangement was carried out. Upon the arrival of a shipment of motor vehicles trust receipts as to such vehicles are delivered to the bank or financial institution and checks are issued by the motor vehicle dealer on the account (established by the line of credit) and paid by the bank or financial institution from the account established by the line of credit. The obligation to pay is evidenced by the written financial arrangements and the promissory note and not the trust receipts or the customer's check. This was not the case with the facts upon which the opinion of Dec. 11, 1953 was based. The trust receipts, not being written obligations to pay but merely security instruments given to secure the line of credit established under the written financial arrangement and promissory note, are not written obligations to pay money, and, unless notes, other than the original one given in connection with the establishment of the line of credit, are made, executed and delivered, there would seem to be no tax due, except on the obligation upon which the line of credit was based.

After the line of credit is established the customer's account, pursuant to the line of credit, takes on the features of a revolving account, varying from time to time and day to day. The promissory note evidences an agreement to repay the line of credit established as aforesaid; not to repay each and every item paid from the account or credit established. The bank or financial institution advances to the customer a line of credit, in the nature of a revolving account, not to exceed a specified amount. The bank advances the

original line of credit, the customer makes deposits into the account and issues checks on the account in the same manner as though he had made the original deposit in the first instance. As motor vehicles are sold and others purchased by the motor vehicle dealer the collateral security, not the original obligation, is changed. The promissory note appears to be within the purview of §201.08, F. S., which imposes an excise tax on "promissory notes, non-negotiable notes, written obligations to pay money...made, executed, delivered, sold, transferred or assigned in this state."

We are, therefore, of the opinion that the promissory note made and delivered by a motor vehicle dealer to a bank or other financial institution, along with an agreement or contract for motor vehicle financing, is an obligation to pay money or a promissory note so as to be within the purview of said §201.08, F. S. The obligation under the promissory note and contract or agreement is limited in amount to the obligation therein mentioned for the purpose of taxation under said §201.08. The trust receipts being in the nature of security instruments securing the payment of the general obligation under the note and contract are not obligations for the payment of money. Only the obligation in the master note or notes and the contract are within said §201.08. The relations between the motor vehicle dealer and the bank or financial institution are somewhat like an open account secured by some type of security, which varies from day to day.

059-45—March 2, 1959

#### TAXATION

MUNICIPAL TAX SALE CERTIFICATE—LIABILITY FOR INTEREST WHERE CERTIFICATE ISSUED FOR ERRONEOUS AMOUNT—CHS. 15082, 1931 AND 57-1143, AND §§192.21, 194.35-194.39, F. S.

To: *Claude S. Jones, City Attorney, Belle Glade*

#### QUESTION:

**Where a municipal tax sale certificate is issued in an erroneous and excessive amount, not in conformity with the tax assessment, may the purchaser thereof recover interest upon the excessive amount of the certificate upon its correction to the proper amount?**

It appears from the correspondence that the municipal tax collector, through an error in determining the amount of the delinquent taxes due and to be included in the tax sale certificate erroneously inserted on the said certificate the amount of \$51.95 instead of the correct amount of \$10.47, which error was subsequently discovered and steps were taken to correct the error by issuing a corrected and amended tax sale certificate. The purchaser of the erroneous certificate refuses to surrender the erroneous certificate unless and until he is paid interest at the legal rate of 18% per annum from the date of the certificate until date of refund of excessive amount of the certificate. The property owner has tendered the correct amount of the delinquent tax together with statutory interest thereon in redemption thereof. It appears from the present and former municipal charters (Chs. 15082 and 57-1143, 1931 and 1957) the municipality adopts the procedure followed by the county tax assessor and collector in assessing and collecting taxes.

We gather from the opinion in *Thompson v. Key West, Fla.*, 82 So. 2d 749, as well as the adoption of the county procedure for tax assessments and collections by the municipal charters above mentioned, that §192.21, F. S., would, unless in conflict with some provision of the municipal charter, and no conflicting provision is found by us, be applicable to the assessment in question. This section provides that errors of commission and of omission made by tax officials in an assessment "may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place, and when so corrected they shall be construed as valid ab initio..." The taxing officials appear to have been authorized and justified in correcting the erroneous certificate. Illegalities in a tax assessment do not affect the duty of the landowner to pay a lawful tax (*Thompson v. Key West, supra*). Invalid assessments do not impair statutory tax liens for a proper tax (*Ranger Realty Co. v. Hefty*, 112 Fla. 654, 152 So. 439). It is the continuing duty of taxing officials to make a valid and legal tax assessment and to collect such legal tax (*Ranger Realty Co. v. Lummus*, 111 Fla. 746, 149 So. 650).

"It is a universal rule that there must be a valid levy and assessment of taxes before any lien for taxes" attaches to the lands assessed (*Certain Lots v. Monticello*, 159 Fla. 134, 31 So. 2d 905, text 914). It seems to be a general rule that where there was an error in the amount of the tax for which lands are sold at a tax sale that such an error is jurisdictional and not binding upon the landowner (85 C. J. S. 349, §911). Where a parcel of land is excessively overvalued for purposes of taxation the assessment is at least voidable as to the excess tax levy caused thereby if not void (*German-American Lumber Co. v. Barbee*, 59 Fla. 493, 52 So. 292; *Tampa v. Palmer*, 89 Fla. 514, 105 So. 115; *Coombes v. Coral Gables*, 124 Fla. 374, 168 So. 524). It seems clear that the landowner, under the circumstances stated above, would not be liable for interest upon the excessive amount of the certificate nor would the lands assessed. This brings us to the question of the liability of the municipality for the interest claimed.

Under §194.35, F. S., where some error made in a tax proceeding invalidates a tax sale certificate in whole or in part the holder thereof is entitled "to the return of the amount received therefor" by the county. (To the same effect see also §§194.36 and 194.37, F. S.) Section 194.39, F. S., makes the provisions of §§194.35, 194.36 and 194.37, above mentioned, applicable to municipal tax sale certificates. These statutes speak of refunds of the amounts received by the county or municipality, no provision being made for the payment of interest thereon. It is a general rule that the state and its agencies are not liable for interest on claims against them unless it be otherwise provided by statute or the constitution (*U. S. v. North Carolina*, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336, text 338; *Treadway v. Terrell*, 117 Fla. 838, 158 So. 512, text 517; *Hawkins v. Mitchell*, 34 Fla. 405, 16 So. 311, text 316). The tax sale certificate in question being invalid, at least as to the excess amount, would not be within the statute providing for interest at the rate of 18% for the first year of tax delinquency. Here it should be remembered that the above mentioned §§194.35-194.39, F. S., make provision for a refund of the sum or sums paid by the holder of the defective tax sale certificate, but no provision for interest. This brings us to the question of the holder's right

to statutory interest under the general interest statutes.

There seems to be a sharp conflict between the authorities as to whether interest may be collected on obligations of municipalities in the absence of a statute or constitutional provision therefor (64 C. J. S. 1024, et seq., §2184; 38 Am. Jur. 380, §672); however, "interest is recoverable, it generally does not accrue from the date of the maturity of the claim, but only from the date of the demand or presentation of the claim" (64 C. J. S. 1026, §2184; see also 38 Am. Jur. 380, §672).

In the light of these authorities and §§194.35-194.39, F. S., we hold that the purchaser of the tax sale certificate in question, it being at least voidable as to the excess amount, is not entitled to interest thereon.

The above question is, therefore, answered in the negative.

059-46—March 2, 1959

#### TAXATION

**TAX DEEDS—VALIDITY OF WHEN DESCRIPTION DEFECTIVE—CHS. 14572, 1929 AND 17442, 1935, AND §§192.21 AND 196.12, F.S.**

To: *Ray C. Helms, Clerk Circuit Court, Milton*

#### QUESTION:

Where an application for tax deed was made and tax deed sale notice was published under the description of "all block 2, section 23, township 1 north, range 29 west," when the Floridatown Heights subdivision in said section, township and range was intended, is such tax deed a valid conveyance of the lands described?

An examination of the government survey and township plat of township 1 north, range 29 west, reveals that section 23 thereof is in fact the John Innerarity Spanish grant totaling 842.48 acres. This plat shows no "block 2" in the said grant or survey and plat. This examination of the government survey and township plat suggests an error in the description contained in the deed.

We are advised by your letter of Jan. 13, 1959, that the tax sale certificate, upon which the tax deed purports to be based, bears date of Sept. 7, 1936, and evidences an assessment made in 1935 for 1935 taxes, and that "the 1935 tax roll lists this land as being in Floridatown Heights subdivision, but the tax collector at that time failed to put the name of the subdivision (Floridatown Heights) on the certificate." You further advise that "we have a Floridatown subdivision and Floridatown Heights subdivision, both in section 23, township 1 north, range 29 west, and both have block two." The description as contained in the tax deed proceedings and in the tax deed itself could be applicable to two tracts of land in said section, township and range. This being true it seems that the tax deed sale notice, published as a predicate to the issuance of the tax deed in question, was insufficient (*Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333; *Wells v. Thomas, Fla.*, 78 So. 2d 378 and 89 So. 2d 259). The tax deed was, therefore, insufficient to divest title from the former owners and vest it in the tax deed grantee.

We pass next to the sufficiency of the assessment and the attaching of the tax lien. We gather from your correspondence



that the lands were properly and sufficiently described on the 1935 tax roll, as block 2, Floridatown Heights subdivision, in section 23, township 1 north, range 29 west, or words and figures of the same import. The assessment therefore appears to have been a valid assessment. This being true the tax lien attached to the lands as described in the said 1935 tax roll under §1 of Chapter 14572, 1929, which section provided in part that "all taxes imposed pursuant to the constitution and laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed . . ." Although it be admitted that the tax sale certificate in question may have been defective, for want of a sufficient legal description, "the taxes assessed, the law made them a lien which is subject to sale in the manner requested," that is under the Murphy act (*State v. Gay*, 133 Fla. 826, 183 So. 463). In this case a peremptory writ was issued directing the sale and assignment of the tax lien, although no tax sale certificate had been issued by the county tax collector. The tax lien, based upon the assessment made in 1935, under the above mentioned act of 1929, became a lien upon block 2, Floridatown Heights subdivision, in section 23, township 1 north, range 29 west. This lien was a valid and existing lien when purchased by T. J. Owens and was held by him when he made application for a tax deed in 1954. This lien does not appear to have been divested by the proceedings had on the application for tax deed sale.

The tax deed sale notice being insufficient because of the defective description (*Ozark Corp. v. Pattishall*, and *Wells v. Thomas*, supra) the matter seems now to stand on application for a tax deed. Unless the lien of the tax assessment has been barred by limitations or non-claim, the error of the tax collector being one "of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as it is now or may hereafter be provided by law for performing such acts in the first place, and when so corrected they shall be construed as valid ab initio and shall in no way affect the process by law for the enforcement of the collection of any such tax . . ." (§1, Chapter 14572, and §2, Chapter 17442, of 1929 and 1935; §192.21, F. S.). This statute authorizes and permits the tax collector of the county to correct the description in the tax sale certificate by inserting therein reference to the Florida Heights subdivision, thereby conforming the description therein to the description on the assessment roll. Although the notice of the tax sale, pursuant to which tax sale certificates are issued, is designed to produce buyers at the tax sale for the benefit of the state or county revenue and not to protect the rights of the taxpayer, "since the delinquent taxpayer can lose nothing of a final or conclusive nature through the mere issuance of a tax sale certificate on his land," it is not the process which divests the taxpayer of his property (*Ozark Corp. v. Pattershall*, supra).

Although the tax sale certificate was defective, it was subject to correction under §192.21, F. S., and probably subject to the limitations imposed by §196.12, F. S. The application for the tax deed sale, although it may have been defective because of the above defect in the tax sale certificate, was not void. It appears to have been subject to correction under §192.21, F. S., as was the tax sale certificate. Not being informed of the date



the tax sale certificate was assigned to T. J. Owen we are unable to say whether he has owned the same for a period of five years as mentioned in said §196.12, F. S. We feel that the filing of the application for tax deed sale tolled the running of the limitation contained in said §196.12, F. S., (34 Am. Jur. 202-203, §247,) in the same manner as the filing of an action or suit for enforcement. Where a proceeding is brought within the statute of limitation, it is usually held that amendments of the pleadings, so long as no new and different cause of action is introduced, toll the statute of limitation if brought within the time allowed by the limitation. We, therefore, feel that there may be an amendment and new publication of the notice for tax deed and the holding of a new tax deed sale, pursuant to which a new tax deed may be issued.

We, therefore, answer the above stated question in the negative, in that no sufficient notice of the application for tax deed has been given by the clerk of the circuit court as required by law. However, we feel that the tax sale certificate is subject to correction, under §192.21, F. S., and that the application for tax deed sale may be corrected, so as to conform to the tax sale certificate as amended, and that the tax deed sale notice may be likewise corrected and republished for the time required and a new tax deed sale held pursuant thereto and a new tax deed issued. Unless this may be done the limitations contained in §196.12, F. S., may have intervened, and barred enforcement. We doubt that the original tax deed proceedings were sufficient to support the issuance of a new and corrected tax deed; however, should they be deemed sufficient by interested parties then the clerk may issue a corrected tax deed upon the original proceedings.

059-47—March 2, 1959

#### TAXATION

OCCUPATIONAL LICENSES AND LICENSE TAXES—BASEBALL GAMES IN MUNICIPAL STADIUMS—CH. 205, AND §§205.61 AND 205.68, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where a municipality pays a license tax under §205.61, F. S., for the operation of its stadium, are third parties putting on baseball games, and other forms of entertainment, for their own account and not the account of such municipality or stadium, subject to separate license taxes?

Licenses and license taxes paid under §205.61, F. S., authorize the licensee to put on for his or its own account the entertainment and services therein mentioned. The purpose of Chapter 205, F. S., is to license persons, firms and corporations (as defined in §205.68, F. S.), to engage in the businesses, professions and occupations therein mentioned and provided for. License taxes imposed by said Chapter 205, are charges imposed for the privilege of engaging in the businesses, professions and occupations included therein (St. Petersburg v. Fla. Coastal Theatres, Fla., 43 So. 2d 525). It is violative of said Ch. 205 for any person, firm or corporation to engage in this state in any of the businesses, professions and occupations for which a license is re-

quired unless and until such license tax is paid and license obtained. The tax is imposed upon those who engage in businesses, professions or occupations for which a license and license tax is required. The license procured by and issued to the municipality under and pursuant to §205.61, authorizes and permits the municipality to put on or engage in the businesses, professions or occupations mentioned in said section, for the account of the municipality, at the location mentioned; that is, in the stadium.

The terms "business," "occupation," "trade," or similar ordinarily intend to mean activities carried on for profit or livelihood (53 C. J. S. 556, §27). Where the municipality leases its stadium to others who use it in connection with their businesses, occupations or professions, carried on by them for profit and livelihood, the business, profession or occupation there subject to licenses and license taxes are those of the lessee and not of the municipality or lessor. The license paid by the municipality in connection with the stadium relates to municipal occupation and use of the stadium for its own account, and not to its use by others for their own account. When the municipality uses the stadium for various and sundry events, such as circuses, roller derbies, etc., such use is for the account of the municipality or for the public generally, and not for others.

Where the municipality leases its stadium to a baseball league, or other operator unconnected with the municipality, for the separate account of such league or other operator, the municipality receiving rent for the stadium only, such baseball games or other entertainment put on by such baseball leagues or others for their own account and profit, and not for the account and profit of the municipality, are their own business, profession or occupation, and not that of the municipality, for which they (baseball leagues or others) are liable for licenses and license taxes imposed by Ch. 205, F. S., notwithstanding the municipality may hold a license for its own entertainment or business put on for its own account. This is especially true where the baseball league or others derive their compensation directly from admissions or the sale of tickets and is not in any way subsidized by the municipality or its stadium.

These statutes, authorities and observations lead to an affirmative answer to the above stated question.

059-48—March 2, 1959

#### TAXATION

RAILROAD PROPERTY—VALUATION AND ASSESSMENT  
OF PROPERTY TRANSFERRED TO PENSION FUND—CH. 57-  
295; CH. 195 AND §195.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Where an office building, owned and operated by a railroad as its general offices is conveyed to a trustee as the railroad's contribution to an employees' pension plan, there being no interruption in the use of the said office building for general office purposes, should the same be returned and assessed for purposes of taxation by the county tax assessor or by the railroad assessment board?

The purpose of the unit system of railroad taxation, as pro-

vided by Ch. 195, F. S., "is to treat the physical properties, intangible properties and capital stock of a railroad as a unit for taxation and to distribute the assessed value thereof to the counties and other units of government in proportion to mileage. Such a system is in general use throughout the country . . ." (Simpson v. Lofton, 160 Fla. 20, 33 So. 2d 230, text 232). All the properties of the railroad owned and used in connection with the operation of the railroad is subject to taxation under said Ch. 195, §195.01, F. S., requires the return by the railroad of "the total length of such railroad, the total length and value of such main track, branch, switch and spur track, and side tracks, lots or parts of lots not leased or rented and terminal facilities," together with all "other personal property used or to be used in connection with the construction, operation and maintenance of the property of the company." This statute has been held valid (Bloxham v. Fla. Central and Peninsular R.R. Co., 35 Fla. 625, 17 So. 902).

In Seaboard Air Line Railroad Co. v. Gay, Fla., 74 So. 2d 569, text 572, the court, prior to the enactment of Ch. 57-295, stated that "reading the statute as a whole, the court is of the opinion that the legislative intent was that the railroad assessment board should apportion between the several counties the value of the real estate, tracks, roadbed, etc., and the comptroller should apportion the value of the personal property." Now, under said Ch. 57-295, the railroad assessment board makes both apportionments. "In assessing railroad property the assessment board acts in lieu of sixty-seven county tax assessors with reference to railroad property." The purpose of Ch. 195, F. S., is to treat railroad properties, used in the operation of the railroad as a unit. This brings us to the question of whether or not the office building in question is *owned and operated* for railroad purposes, under the circumstances involved. This brings us to a consideration of the phrases, used in the statutes, of "lots and parts of lots not leased or rented and terminal facilities," and whether or not a general office building used by the railroad as its general and district offices is within the said phrase. This would seem to be largely a question of fact to be determined from all available facts. In Simpson v. Lofton, 160 Fla. 20, 33 So. 2d 230, text 231, the court held that certain tangible personal property in the "general offices of the Trustee for the East Coast Railway Company and their Counsel in the Graham Building in Jacksonville (building not owned by the railroad) . . . were owned and held by the East Coast Railway exclusively for railroad purposes and under the law were assessable by the Comptroller or the Railway Assessment Board." This seems tantamount to holding that the general offices above mentioned were essential to its operation.

A seven story general office building of the Great Northern R.R. Co., in Ramsey county, Minnesota, was involved in State v. Great Northern R.R. Co., 142 Minn. 173, 171 N. W. 317, which, although the general offices had been moved to a new building, was being used for the storage of records, the files and book cases of the legal department, and other purposes incidental to the operation of the railroad. Another part of the building was occupied by the express company. The court found that the building was principally devoted to railway uses, which use was not subordinate to any other use, and therefore entitled to tax

exemption as property essential to the operation of the railroad. Lands used for general railroad offices were held essential for railroad use in *Richmond and Danville R.R. Co. v. Comms. of Alamance*, 84 N. C. 504, text 505-507; *East Penna. R.R. Co. Case*, 1 Walker (Pa.) 428 (Supreme Court); and *Appeal of Penna. R.R. Co.*, 3 Pa. Co. 162. Although in the *East Pennsylvania Railroad Co.* case the property was separate from the tracks and right of way for which reason it was held not within the statute. We, therefore, hold that the general offices of a railroad are essential to its operation and that an office building owned and used for such purposes would be within the purview of §195.01, F. S. This brings us to the question of the ownership of the office building. The general offices of the railroad in question occupy the office building in question; however, there seems to be a question of ownership of title involved.

It follows from the above and foregoing that the office building in question is being used for railroad purposes, which brings up the question of the effect of its transfer to a trustee as the railroad's contribution to its employees' pension plan. It appears from the deed that the railroad, for the consideration mentioned in the deed of conveyance, conveyed said general office building to a corporation, in which instrument the holders of certain mortgages released the lands conveyed from the lien of their said mortgages. This conveyance purports to convey the property *in fee simple forever*, to the grantee. We gather from correspondence with the vice-president and general counsel for the railroad that the above conveyance was made to the said grantee as a conduit for finally vesting title in a trustee of a pension fund. In other words, the office building is to be the contribution of the railroad, in whole or in part, to the pension fund for its employees. The actual details in this connection do not appear from the file before us. It seems to be contemplated that the office building in question will at all times be occupied by the railroad as its general operating offices, under some type of lease or rental arrangement. It may well be contemplated that such occupancy be based on some type of perpetual lease in order to insure occupational continuity of the building by the railroad as general offices. The value of the office building will, under the circumstances, create, in whole or in part, the railroad's portion of the reserves required for the pension plan.

"It has been held that the relief department of a railroad company, having a fund created by contributions by the company and the employees who become members, out of which certain sums are payable in case of sickness, injury or death, does not carry on an insurance business" (Annotation in 63 A. L. R. 767). In *King v. Atlantic Coast Line R.R. Co.*, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (NS) 450, the court appears to have considered a department maintained by the railroad for the relief of injured employees as a corporate function and not an insurance business. It was held in *Harrison v. Alabama Midland R.R. Co.*, 144 Ala. 246, 40 So. 394, in substance, that the act of a railroad company in organizing, or assisting in the organization, of a relief and hospital department, whereby injured employees are furnished medical treatment, paid weekly benefits while injured, and their families death benefits, was not an ultra vires act. In the opinion in this case it is stated that "the primary object of a railroad



company is to build, equip and operate its line for the transportation of freight and passengers. In so doing, a vast number of employees are employed, all of whom, while in service on the line, are subject to dangers in multiplied forms, and physical injuries, for which the companies are subjected to liability, and the injured often to irreparable loss. Any device or improvement which prevents or is intended to prevent these evils, is incident to the due exercise of their powers, and clearly within the scope of their organization. . . ." A similar plan was under consideration in *Atlantic Coast Line R.R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761, text 767, et seq.

Pension and benefit plans for employees have been said to "provide a legitimate method of granting employees deferred compensation in addition to basic salaries where the payments to be made thereunder bear a reasonable relation to the value of the services rendered, and hence are not objectionable as a gift which majority stockholders have no right to make over the protest of the minority" (56 C. J. S. 825, §168). In this same connection see also *State v. Pittsburgh, Cincinnati, Chicago and St. Louis R.R. Co.*, 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 A. S. R. 635; *Maine v. Chicago, Burlington and Quincy R.R. Co.*, 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; and *Anno.* in 4 Ann. Cas. 911, 6 Ann. Cas. 11, and 3 A. L. R. 445.

In the light of the above and foregoing the pension and benefit plan in question, for the officers and employees of the railroad, may well be considered as an adjunct to the operation of the railroad and a facility in its operation, although the fund created in connection with the pension and benefit plan may have been contributed by both the railroad and its officers and employees.

There appears to be another feature involved, which would seem to be applicable to the 1959 tax assessment, but which may or may not be applicable to subsequent years; that is, the fact that the pension and benefit plan in question has not yet been completed. This being true, the corporation now holding title to the office building holds it in trust for the trustee of the plan, if and when established; if not established, the title to the property will evidently return to the railroad; for the present and for the tax year of 1959, it seems reasonable to hold that the office building is still in equity the railroad's building.

We, therefore, in the light of the facts and circumstances involved, hold that the office building in question should for the year 1959 be considered as railroad property within the purview of Ch. 195, F. S., and likewise for subsequent years, should the pension and retirement system be set up as planned (that is, as reflected from the file before us).

059-49—March 3, 1959

#### TAXATION

MUNICIPAL LANDS—EXEMPTION—§1, ART. IX, STATE CONST; §192.06 (2), F.S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. If land is owned by a municipality, but not used for municipal purposes, and if offered for sale, condi-



tional or otherwise, is said land subject to taxation by the county?

2. If land privately owned is leased to a municipality and the land then used for municipal purposes, such as a parking lot, is said land subject to taxation by the county?

3. A city constructs a building and leases the same to the federal government for a 10-year period for a post office, is such land subject to taxation by the county?

#### AS TO QUESTION 1:

Section 1, Art. IX, State Const., excepts from taxation "such property as may be exempted by law for *municipal*, education, literary, scientific, religious or charitable purposes." (Emphasis supplied.)

Section 192.06(2), F. S., provides for an exemption from taxation on: "All public property of the several counties, cities, villages, towns, and school districts in this state used or intended for public purposes. . ."

" . . . the taxable character of property is the nature of the use to which it is put and not the ownership." (Park-N-Shop, Inc., v. Sparkman, 99 So. 2d 571; City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744; University Club v. Lanier, 119 Fla. 146, 161 So. 78; State ex rel Harper v. McDavid, 145 Fla. 605, 200 So. 100, 133 A. L. R. 360; City of Cleveland v. Ruple, 130 Ohio St. 465, 200 N. E. 507, 103 A. L. R. 853.)

It is assumed from your question that the land involved herein is not being used for a municipal purpose. However, since so many undertakings have of late been considered as municipal purposes, it is deemed advisable to direct your attention to the following authorities wherein the Florida supreme court has defined municipal purposes and public purposes: Saunders et al v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648; Zinnen v. City of Fort Lauderdale, 159 Fla. 498, 32 So. 2d 162; State v. City of Pompano Beach, Fla., 47 So. 2d 515; State v. City of Jacksonville, Fla., 50 So. 2d 532; State v. Escambia County, 52 So. 2d 125.

Assuming that the land described in question 1 is not being used for a municipal or public purpose it would appear from the authorities cited above that question 1 should be answered in the affirmative.

#### AS TO QUESTION 2:

Relying again upon the authority cited in question 1 for the proposition that the taxable character of property is the nature of the use to which it is put and not the ownership and assuming that the use to which the property has been put falls within that category defined as a municipal purpose, question 2 is answered in the negative.

#### AS TO QUESTION 3:

This question appears to be answered in two recent Florida supreme court cases, Patrick Gardens, Inc. v. J. D. Nash, Tax Collector of Brevard County, and Patrick Village, Inc. v. J. D. Nash, 100 So. 2d 626, which are based on Park-N-Shop, Inc. v. Sparkman, supra. In the Patrick Gardens and Patrick Village cases, supra, the Florida supreme court extended the theory expounded in Park-N-Shop, Inc. v. Sparkman to the effect that the taxable character of property is the nature of the use to which it is put

and not the ownership to include lands leased by the federal government. Although the Patrick Gardens and Patrick Village cases are summarized in a per curiam opinion, a reading of the briefs and allied papers indicates that the lower court approved the taxation of buildings leased by the U. S. government for federal housing (Wherry Housing). The Supreme Court reversed the lower court on the basis of *Park-N-Shop, Inc. v. Sparkman*, thus giving effect to the established principle that the federal government is immune from state taxation unless it should consent thereto. (See also 84 C.J.S. 381 and 474, Taxation, §§198 and 252; 51 Am. Jur. 278, Taxation, §218; 114 A. L. R. 318; 140 A. L. R. 635, and *Riverside Military Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870, at 872.)

In discussing a question of taxation of state owned lands the Florida supreme court in *State of Florida ex rel Charlotte County v. Julian R. Alford*, Fla., 107 So. 2d 27, stated "such exemption is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government," thus indicating that there need not be a specific statutory exemption in order for lands to be exempt from taxation.

In view of the trends manifested in the decisions cited above, question 3 is answered in the negative, conditioned on the assumption that the federal government has not consented to pay the tax under discussion.

059-50 (059-20 revised)—March 5, 1959

#### TAXATION

#### GROSS RECEIPTS TAX—FACTORY MUTUAL FIRE INSURANCE COMPANIES OPERATING ON DEPOSIT PREMIUM PLAN—§205.43, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

#### QUESTION:

**On what basis should factory mutual fire insurance companies pay the gross receipts tax imposed by §205.43, F. S.?**

The associated factory mutual fire insurance companies are a group of eight property insurance companies specializing in the insurance of high grade industrial and manufacturing property. Their method of operation is somewhat different from that of other insurance companies. At the time a policy is issued the policyholder is required to deposit a sum of money called a "premium deposit" from which his share of the losses and expenses of the company will be paid while the policy is in force. This premium deposit is not based upon the estimated cost of insurance but the deposit is the same for a given risk regardless of the term for which the policy is written. Each month a computation of losses and expenses is made and a proportionate amount is charged against each premium deposit. At the end of the policy term the remainder of the premium deposit is available for return to the policyholder. Thus it is clear that the cost of the insurance is determined *after* the protection is given and not at the time the insurance becomes effective.

Section 205.43, F. S. provides:

... An amount equal to two per cent of the gross amount of receipts of insurance premiums or assess-

ments, including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, paid by policyholders or certificate holders and paid upon surety, indemnity or reciprocal or interinsurance contracts or agreements, in this state, which amount shall be calculated upon gross premiums or assessments, including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, received, omitting premiums on reinsurance accepted, and less return premiums or assessments, but without deductions for reinsurance ceded to other companies, and without deductions for moneys paid upon surrender of policies or certificates for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of premiums or assessments, and without deductions on account of dividends of any nature or amount paid and credited or allowed to holders of insurance policies, certificates, or surety, indemnity, or reciprocal or interinsurance contracts or agreements; . . .

It is my opinion that the tax due from factory mutual fire insurance companies under §205.43, F. S., should be computed on the basis of the gross amount of premium deposits received during the tax year, less the unused premium deposit returned to policyholders. This opinion should not be construed as authorizing mutual insurance companies, having fixed rates which are payable in advance, to deduct from gross premiums the dividends paid to policyholders. The distinction between deposits of factory mutual insurance companies and premiums of ordinary mutual insurance companies is that in the former case the deposit is a fund to pay the cost of protection, while in the latter case a specified sum is paid for the protection with a right to share in the company's earnings.

Your question is answered accordingly.

059-52—March 5, 1959

#### SHERIFFS

#### CONTRACT TO TRANSPORT PRIVATE PROPERTY BY PUBLIC OFFICIAL USING PUBLIC VEHICLE

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs Ass'n, Tallahassee*

#### QUESTION:

**May a sheriff or his deputy transport private funds from a bank to a depository some 30 miles from the bank's location?**

In your request you state that the sheriff, accompanied by a deputy and an employee of the bank, transports money each week from a local bank to a metropolitan depository, using the sheriff's car for transportation. The entire trip takes about three hours and the bank pays all costs, which moneys are remitted to the county.

The sheriff by this action is in effect performing the duties of a guard for a private individual or corporation under the authority of his office. He is also in possible competition with private business whose primary purpose it is to transfer bank

deposits by use of armored cars, etc.

I find no Florida statutes which authorize a sheriff to engage in the protecting and transporting of private funds under such circumstances. In addition, it seems to be settled law that a sheriff, constable or deputy cannot contract to guard private property which is not in the custody of the law. (See 80 C. J. S., Sheriffs and Constables, § 49, p. 223; 47 Am. Jur., Sheriffs, Police and Constables, § 26, p. 840.)

It is my opinion that a sheriff or his deputies may not under the guise of their office contract to transport private funds using equipment paid for with county funds for such purpose. This opinion is intended to cover only those instances where a sheriff or his deputy using equipment of his office transports, as a matter of course, funds for a bank. It is not intended to cover an isolated instance where for valid reasons and in the public interest it is necessary to furnish protection, nor is this opinion intended to pass upon the authority of a sheriff or his deputy to engage in such private ventures during off-duty hours without the use of equipment of his office.

With the above qualifications your question is answered in the negative.

059-53—March 10, 1959

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM—COMPUTATION OF BENEFITS—§19, ART.

V, STATE CONST.; CH. 122 AND §§122.08(1), (4) AND

122.28(1), F. S. AND FORMER CHS. 121 AND

134 AND §§121.05 AND 134.05, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a judge, retired under the provisions of the state and county officers and employees retirement system, is recalled to active judicial service, how is the difference between his retirement benefits and the compensation applicable to such service, within the purview of §19, Art. V, State Const., to be calculated?

Section 19, Art. V, State Const., provides in part that "a retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service." The compensation applicable to such service is doubtless the compensation payable to the judge or judges of the court to which assigned during the time of the assignment under the statutes and laws. The retired judge in question being a member of the state and county officers and employees retirement system we assume, for the purpose of this opinion, that the judicial office in question is neither the supreme court, a district court of appeals, or a circuit court; this presumption eliminates any county supplemental compensation to a state judge. We are dealing here strictly with a compensation paid by a county and not by the state, either in whole or in part. We are concerned with the meaning of "retirement benefits" as intended by the above quoted provision in §19, Art. V, State Const.

This question not here involving supreme court justices,



district courts of appeal judges or circuit judges, does not involve retirements under Ch. 123, F. S., but retirements under Ch. 122, F. S., the state and county officers and employees retirement system. Under §122.08(4), F. S., county officers and employees within the said retirement system are permitted to "elect to receive a *reduced retirement compensation* with the provision that the surviving spouse shall continue to draw such reduced compensation . . . so long as such spouse shall live. The amount of such *reduced retirement compensation* shall be the actuarial equivalent of the amount of such retirement compensation otherwise payable such officer or employee." (Emphasis supplied.) Such reduced retirement compensation is based upon the provisions of §122.08(1) and 122.28(1), F. S., providing the regular retirement compensation of state and county officers and employees under Ch. 122, F. S. Does the reference in §19, Art. V, State Const., to "the difference between his retirement benefits and the compensation applicable to such service," refer to the *basic retirement benefits* provided in Ch. 122, F. S., or to the actual compensation being paid the retired judge, including the *reduced retirement compensation* above mentioned? Where a state or county officer elects to receive a *reduced retirement compensation*, as provided in §§122.08 and 122.28, F. S., upon retirement, then is that *reduced retirement compensation*, or the basic retirement benefits upon which based and determined, the "retirement benefits" contemplated by §19, Art. V, State Const.?

Although revised and amended Art. V, State Const., was not adopted until after the consolidation of Chs. 121 (state officers and employees retirement system) and 134 (county officers and employees retirement system) into Ch. 122, F. S., it must be noted that said amended article of the state constitution was submitted by the 1955 legislature, which was the same legislature which consolidated and revised said Chs. 121 and 134 into Ch. 122, F. S. It is also noted that §§121.05 and 134.05, of said Chs. 121 and 134, F. S., contained substantially similar provisions for *reduced retirement compensation* as do the said §§122.08 and 122.28, F. S. The legislature, when it submitted revised Art. V, State Const., containing above mentioned §19, of said Art. V, was fully advised of the provisions for reduced retirement compensation. Under said §§122.08 and 122.28, F. S., the retiring officers and employees are entitled to a *basic retirement benefit* and an election to take that basic retirement benefit during the remainder of his or her life, or during the remainders of the joint lives of such state and county officer or employee and his or her spouse. The grantable basic benefits are the same, although spread over different periods of time due to the combining of the remainders of two lives. The *reduced retirement compensation* paid a retired state or county officer or employee under §§122.08 and 122.28, F. S., is measured by the *basic retirement benefits* due such officer under said Ch. 122, F. S.; his *basic retirement benefits* are the same whether he takes the *regular retirement compensation* during the remainder of his lifetime, or combines the remainders of his lifetime with that of his wife and receives a *reduced retirement compensation* during the remainder of his lifetime.

We, therefore, conclude that when a judge, retired under the provisions of the state and county officers and employees retirement system, is recalled to active judicial service, the difference between his "retirement benefits" and the compensation applicable



to such service, within the purview of §19, Art. V, State Const., is the difference between his *basic retirement compensation*, mentioned in §§122.08(1) and 122.28(1), F. S., and "the compensation applicable to such (judicial) service," mentioned in the said section and article of the Florida constitution, and not any *reduced retirement compensation* elected under said §§122.08 and 122.28, F. S., in lieu of the *basic retirement compensation* mentioned.

059-54—March 10, 1959

#### JUDICIAL DEPARTMENT

RETIREMENT SYSTEM—CREDIT FOR PRIOR PUBLIC SERVICE AS ATTORNEY—CH. 123 and §123.03(3), F.S. AND FORMER CHS. 121 AND 134, F.S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Is a member of the supreme court justices, district court of appeals judges and circuit judges retirement system under Ch. 123, F. S., entitled to service credit for employment as attorney for a county board of public instruction, assistant attorney general and attorney for the Florida citrus commission, not claimed prior to the enactment of said Ch. 123?

The person in question became a judge of a district court of appeals on July 1, 1957, prior to which time he had served as a circuit judge without interruption from June 3, 1953, until his qualification as judge of the district court of appeals aforesaid. At the time of his appointment as circuit judge he had served a total of six months as attorney for a board of county commissioners in this state, by reason of which he became a member of the county officers and employees retirement system, under Ch. 134, F. S. He was refunded contributions made under this chapter upon assuming office as circuit judge.

The judge in question appears to have served as an employee of the attorney general of this state (assistant attorney general) from Nov. 1, 1936 to Feb. 1, 1939; as attorney for the board of public instruction for one of the counties from Jan. 1, 1933 until Jan. 1, 1935; and as general counsel for the Florida citrus commission, for a period of approximately four years. So far as we are advised he was not a member of either the state officers and employees retirement system (Ch. 121, F. S.) or the county officers and employees retirement system (Ch. 134, F. S.) during such employment. For the purposes of this opinion we must presume that credit for such service was never claimed under either such retirement system. The above stated question poses the issue of whether the said person may now claim credit for such service under Ch. 123, F. S., the supreme court justices, district court of appeals and circuit judges retirement system. In this connection §123.03(3), F. S., provides that a person who was a member of any other retirement system when he became a supreme court justice, district court of appeals judge or circuit judge, but who received a refund from such retirement system, may "within twenty-four months from the time such person becomes a . . . district court of appeals judge . . . or within twenty-four months from the time this chapter becomes a law, whichever is the later date, pay into the . . ." retirement fund

under Ch. 123, F. S., "five per cent of the salary he has received from the state and county as an employee *beginning with July 1, 1945*, plus three per cent interest per annum thereon. *Thereupon the total time spent as a state or county officer or employee shall be added to and computed with such person's service as a supreme court justice, district court of appeals judge or circuit judge as provided for in this chapter. . . .*" (Emphasis supplied.)

In *E. Clay Lewis, Jr. v. Green*, as comptroller, lately pending in the circuit court in and for Leon county, the main point in issue between the parties, and the one upon which the cause was decided, was whether or not Judge Lewis, as a member of the retirement system under Ch. 123, F. S., was entitled to service credit for the full terms for which elected to the state legislature, or merely the time spent in legislative session. This holding was by a circuit judge from which holding no review was sought. In this case the court held that Judge Lewis was entitled to service credit for his legislative terms beginning on Nov. 2, 1926, Nov. 6, 1928, Nov. 4, 1930, Nov. 8, 1938, Nov. 5, 1940, and from Nov. 3, 1942 to July 10, 1944, when he resigned as a member of legislature. In this case the court held that the "total time spent as a state or county officer or employee" included the above mentioned legislative terms.

Although §123.03(3), F. S., requires that there be paid into the retirement fund thereunder "five per cent of the salary he has received from the state and county as an officer or employee, beginning with July 1, 1945, plus three per cent interest . . .," such provision should not be deemed a limitation upon service credit to be received under the following provision that "the total time spent as a state or county officer or employee shall be added to and computed with such person's service as a justice or judge. The state and county officers and employees retirement systems, under Chs. 22831, 1945 (Ch. 121, F. S.) and 22938, 1945 (Ch. 134, F. S.) required no contributions, with certain exceptions not here necessary, for service rendered the state or county prior to July 1, 1945. We do not, therefore, feel that the above reference to contributions from and after July 1, 1945, prohibits prior service credits.

We are, therefore, of the opinion that the above stated question should be answered in the affirmative if the time requirements in §123.03(3), F. S., have been met by the applicant.

059-55—March 11, 1959

### COURTS

JUSTICES OF THE PEACE—ADDITIONAL COMPENSATION WHEN TEMPORARILY ASSIGNED—§2, ART. V, STATE CONST.; §§38.01 et seq. AND 38.09 et seq., F.S.; CH. 57-991

To: *Bryan Willis, State Auditor, Tallahassee*

### QUESTION:

Is a justice of the peace in a county wherein the justices receive a salary from the county in lieu of fees, entitled to additional compensation when temporarily assigned to handle the duties in another justice of the peace district within the same county?

Section 2, Art. V, State Const., authorizes the chief justice of the supreme court to temporarily assign the judicial officers

of the state but no provision is made therein or in the rules (Rule 2.1 (a), (4), (i), Florida Appellate Rules, as amended March 19, 1958) promulgated thereunder for the compensation of justices and judges so assigned. The compensation act (Ch. 57-991) relating to the justices of the peace districts in question, contains no provision for additional compensation for a justice of the peace temporarily assigned. It is noted in passing that §38.01, F. S., et seq., the sections formerly applicable to the substitution of judges, provided no additional compensation for judges assigned to hear cases in a substitute capacity, although the general appropriations acts have for many years made provision for paying the expenses of circuit judges and criminal court of record judges assigned pursuant to the provisions of §38.09, F. S., et seq., when said sections were applicable. (See A. G. O. 052-233, 1951-1952, biennial report of the attorney general, p. 64.)

The Florida supreme court has on several occasions held that in Florida the services of a public officer may be exacted without specific compensation and further that public officers have a claim for compensation only when such is provided for by law, otherwise such services are deemed gratuitous (*Rawls v. State*, 98 Fla. 103, 122 So. 222; *State v. Fussell*, 157 Fla. 55, 24 So. 2d. 804, and *Gavagan v. Marshall*, 160 Fla. 154, 33 So. 2d. 862). This office has consistently followed the theory in these decisions and reaffirmed this position as recently as Feb. 5, 1959, in A. G. O. 059-28.

While I am in deep sympathy with the equities of the assigned justice referred to in your inquiry, I can find no authority for allowing increased compensation to the temporarily assigned justice. It might, however, be worthwhile to point out the provisions of the Florida appellate rules which are applicable to the instant situation and imply that a judge will not be arbitrarily assigned as a substitute unless he is willing to do so. Rule 2.1 (a), (4), (i), Florida appellate rules, provides in part:

When the judge of any *justice of the peace court*, small claims court, juvenile court, or traffic court is unable to perform the duties of his office because of absence, sickness, disqualification or other disability, and there is another judge or judges of said court *available* and qualified to act, they shall perform the duties of said judge. In such case, if there shall be no judge *willing* to perform said duties, the chief justice, upon being notified by the said judge or the clerk of said court, shall allocate the business of said court to such available or qualified judge or judges who shall perform such duties; . . . (Emphasis supplied.)

Upon the basis of the above quoted provisions of the rules promulgated by the Florida supreme court, the assigned justice in this instance might be justified in petitioning the chief justice of the Florida supreme court for relief if the additional assignment is in fact causing the assigned justice to suffer hardship.

In the light of the authorities cited herein, your question as set out above must, however, be answered in the negative.

059-56—March 11, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES WORKMEN'S COMPENSATION—WAGES—CH. 440, AND §440.02(1), F. S.**

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

**QUESTION:**

In opinion 059-15, dated Jan. 26, 1959, you held that for the purposes of determining compensation of members of the state and county officers and employees retirement system the reasonable value of living quarters, food and lodging furnished members of said retirement system are not to be considered as part of their salary. What effect, if any, has said opinion upon the definition of "wages" under Ch. 440, F. S. (workmen's compensation law) as it pertains to the wages of state and county officers and employees?

Chapter 440, F. S., defines "employment" to include employment by the state and all political subdivisions thereof (§440.02 (1), F. S.). Compensation under said chapter is based upon the injured employee's weekly wages. "Wages" are defined as "... the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, ..." It seems clear, therefore, that the intent of Ch. 440, F. S., is to include in the computation of wages of employees of the state and political subdivisions thereof, the value of living quarters, food and lodging furnished said employees.

While living quarters, food and lodging when furnished to state and county employees are for the convenience of the state or county as employer and are not "compensation" for most purposes, it is my opinion that the purpose and intent of the workmen's compensation law is clearly to include the value of living quarters, food and lodging within the computation of wages of state and county employees when determining their benefits under the workmen's compensation law. Your question is answered accordingly.

059-57—March 12, 1959

**REAL AND PERSONAL PROPERTY  
FORECLOSURE OF MORTGAGES—PROPERTY IN TWO OR  
MORE COUNTIES—JURISDICTION—§702.04, F. S.**

To: *E. B. Leatherman, Clerk Circuit Court, Miami*

**QUESTIONS:**

1. Does §702.04, F. S., refer to mortgages generally, or only to those encumbering railroad tracks, rights-of-way, terminals and stations, lying in two or more counties?
2. Does it relate only to contiguous mortgaged lands or to both contiguous and non-contiguous lands, lying in two or more counties?

Section 702.04, F. S., provides that "when a mortgage includes lands, or railroad track, or right-of-way, or terminal fa-



cilities or station grounds, lying in two or more counties, it may be foreclosed in any one of said counties . . . ." This statute appears to have originated as §1989, Revised Statutes, 1892, providing that "when a mortgage includes land lying in two or more counties it may be foreclosed in any one of said counties . . . ." Chapter 4420, 1895, inserted in said §1989, between the words "land" and "lying" the following, "or a railroad track, or right-of-way, or terminal facilities or station grounds." The amendment by Chapter 7339, 1917, related to evidence of the foreclosure to be furnished other counties by the clerk of the court making the foreclosure. Prior to the adoption of the above provision in the Revised Statutes, 1892, the laws of this state provided for mortgage foreclosure "in the circuit court of the county in which the mortgaged premises are situated, when they are real property . . . ." (Act of Dec. 11, 1824; Duval, 38; Thompson, 376; Bush, 606; and McClellan, 766.)

The fact that the original statutory provision in the Revised Statutes, 1892, related to *mortgaged lands lying in two or more counties*, without any reference to railroads and railroad properties, which was inserted by the 1895 amendment without any indication therein of an intention to limit the operation of the statute to mortgages encumbering railroads and railroad properties, leads to the conclusion that the section relates not only to mortgages encumbering railroads and railroad properties, but also to mortgages encumbering lands lying in two or more counties. The statute includes mortgages encumbering lands lying in two or more counties, whether railroad and railroad properties or not. From the history of said §702.04, F. S., above set out, the legislative intent seems clear that mortgages encumbering lands, unconnected with railroads and railroad properties, are embraced by the statute. These observations answer question 1.

The said statute mentions "lands, or railroad track, or right-of-way, or terminal facilities and station grounds, lying in two or more counties," *without expressly limiting its operation to contiguous properties*. This brings us to the question of whether the statute should be so limited by construction or otherwise. It may well be presumed that "railroad track, or right-of-way, or terminal facilities and station grounds," lying in two or more counties might well be contiguous properties by nature; however, such language was not contained in the original statute, prior to its amendment in 1895, which related to "land lying in two or more counties." The phrase "mortgage includes land lying in two or more counties," especially in the light of the change from "land" to "lands" by the 1895 amendment, may well include non-contiguous lands as well as contiguous lands.

Attention is directed to the court opinions in *Ray v. Williams*, 55 Fla. 723, 46 So. 158, and *Ray v. Williams Phosphate Co.*, 59 Fla. 598, 52 So. 588, in which the validity of a mortgage foreclosure proceeding had in Pasco county was brought into question. We gather from the opinions in the two cases that a mortgage was given encumbering lands in Citrus, and maybe another county or counties, but not in Pasco county; however, the mortgage contained a provision covering after acquired properties. The mortgagors, or one of them, after the making and recording of the mortgage, procured the "conveyance of a half interest in a small tract in Pasco county" to the mortgagor or mortgagors. Suit was



brought in Citrus county to invalidate the proceeding in Pasco county on the ground of want of jurisdiction of the court for purposes of foreclosure. The court appears to have treated the foreclosure proceeding in Pasco county as being at the most irregular and not void for want of jurisdiction. The supreme court treated the proceeding in Citrus county (in a separate judicial circuit to Pasco county) as one court in equity being "asked in effect to enjoin a party from proceeding in another court of equity of equal coordinate and prior jurisdiction merely because of physical convenience." *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267, appears to have been an attempt to foreclose a mortgage encumbering lands only in Liberty county in the circuit court for Dade county. The court, in affirming an order of dismissal, held that a proceeding for the foreclosure of a mortgage is "Quasi in rem and local," and that "the suit must be brought in the county where the land lies. If the mortgaged land lies in more than one county, the statute provides that the suit may be brought in any county in which a part of the mortgaged property is situated."

In *Tampa and Jacksonville R.R. Co., v. Trammell, et al.*, as trustees of the internal improvement fund, 70 Fla. 409, 70 So. 400, a bill of complaint for specific performance was brought against the trustees, in DeSoto county, to procure the conveyance to the railroad of about 250,000 acres of land lying in Dade, Palm Beach, St. Lucie, Monroe, Osceola, Lee and DeSoto counties. There appears to have been around 30,000 acres of said lands in DeSoto county. The lower court had held that the proper venue was at the state capitol. The supreme court, citing §1383, General Statutes, 1906, providing that a suit may be brought in the county "where the county in litigation is," stated that "we do not understand the statute to drive the complainant to the resident county of the defendant if the land sued for lies in more than one county, but that a bona fide claim for land in any county gives the court for that county the absolute right and the correlative duty to entertain the suit."

The author of the Annotation, beginning on p. 1245 of 169 A. L. R., concerning venue of actions involving real estate situated in two or more counties or districts, in considering provisions in statutes for action in county where the property or subject matter, or any part thereof, is situated (169 A. L. R. 1250, et seq.), after discussing such statutes application to single tracts of land lying in two or more counties (169 A. L. R. 1251-1254) says, concerning separate tracts of land, that "While there is some apparent authority to the contrary, it has been generally held in most jurisdictions, under provisions requiring action involving real estate to be brought in the county where the subject matter, or a part thereof, is situated, that an action involving separate tracts located in different counties may be brought in any county where one of the tracts is located; or, as stated in some cases, that the court of either county has jurisdiction, or that the location of one of the tracts in the county of the forum gives that court complete jurisdiction." (169 A. L. R. 1254; emphasis supplied.)

We also refer to 59 C. J. S. 1084, §617; *Stevens v. Ferry*, CC Wash., 48 Fed. 7; Anno. in 2 A. L. R. 2d 1261, 128 A. L. R. 1232, and 110 A. L. R. 1463, bearing more or less upon the question here considered.

From the statutes and authorities considered by us we conclude that:

1. Section 702.04, F. S., refers to mortgages generally, encumbering real property in two or more counties, as well as mortgages encumbering railroads and railroad properties lying in two or more counties; and that,

2. Said section relates to both contiguous and non-contiguous real properties encumbered by a mortgage encumbering such properties lying in two or more counties.

3. Sales of lands in two or more counties pursuant to foreclosure decree made pursuant to this section would appear to be a valid sale.

059-58—March 12, 1959

### MOTOR VEHICLES

#### REGULATION OF TRAFFIC ON HIGHWAYS—BEER AS INTOXICATING LIQUOR—§317.20, F. S.

To: Charles H. Snowden, Judge, Metropolitan Court, Miami  
QUESTION:

Does §317.20, F. S., as framed require the prosecution to prove impairment of the defendant's normal faculties as a result of consumption of a distillation as distinguished from vinous or fermented beverages?

Section 317.20, F. S., provides:

317.20 *Driving while under the influence of intoxicating liquor or narcotic drugs.*

(1) It is unlawful and punishable as provided in subsection (2) for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, when affected to the extent that his or her normal faculties are impaired, to drive or be in the actual physical control of any vehicle within this state.

(2) Every person who is convicted of a violation of this section shall be punished by imprisonment for not more than six months, or by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by both such fine and imprisonment. On a second or subsequent conviction he shall be punished by imprisonment for not less than ten days nor more than six months and, in the discretion of the court, a fine of not more than five hundred dollars.

Reduced to its simplest terms, your inquiry poses the question of whether or not beer is included in the term "intoxicating liquor" as defined in the aforementioned statute.

Although this question has apparently never been directly passed on by the Florida courts, numerous other jurisdictions have been called upon to make such a determination.

A study of those authorities discloses that a majority of the courts have held that beer is included in the term "intoxicating liquor" and have taken judicial knowledge of the same (*Mulane v. U. S.*, C. C. A. N. D., 20 Fed. 2d 903, *Lambie v. State*, 151 Ala. 86, 44 So. 51, 53; *Moffitt v. People*, 59 Colo. 406, 149 P. 104, 107; *Hall v. People*, 134 Ill. App. 559, 560; *Myers v. State*, 93

Ind. 251, 252; *Mullen v. State*, 96 Ind. 304, 306; *State v. Spiers*, 103 Iowa 711, 73 N. W. 343, 344; *State v. Jenkins*, 32 Kan. 477, 4 P. 809; *State v. Mitchell*, 134 Mo. App. 540, 114 S. W. 1113; *Steinkuhler v. State*, 77 Neb. 331, 109 N. W. 395, 396; *Feddern v. State*, 79 Neb. 651, 113 N. W. 127, 129; *State v. Carmody*, 50 Or. 1, 91 P. 446; *State ex rel Lyon v. City Club*, 83 S. C. 509, 65 S. E. 730, 731; *Moreno v. State*, 64 Tex. Cr. R. 660, 143 S. W. 156, 158; and *Vines v. State*, 19 Wyo. 255, 116 P. 1013, 1016).

Other cases have held that beer is not an intoxicating liquor (*State v. Guimbellot*, 232 La. 1043, 95 So. 2d 650, 652 and *Potts v. State*, Tex., 89 S. W. 836).

Still other cases have held that beer may or may not be an intoxicating liquor and that it devolves upon the state at the trial to prove that the beer in question was either a malt liquor or that it was in fact intoxicating (*Kalre v. State*, 43 Ind. 483, 485; *Plunkett v. State*, 69 Ind. 68, 69; *Kurz v. State*, 79 Ind. 488, 490; *Commonwealth v. Hardiman*, 75 Mass. (9 Gray) 136; *Blatz v. Rohrbach*, 116 N. Y. 450, 451, 22 N. E. 1049, 6 L. R. A. 669; *State v. Sioux Falls Brewing Co.*, 5 S.D. 39, 58 N. W. 1, 3, 26 L. R. A. 138; *Harris v. State*, Tex., 86 S. W. 763; and *Sullivan v. State*, 48 Tex. Cr. R. 201, 87 S. W. 150, 151). The Oklahoma supreme court has held that when the term "beer" is used without restriction, it denotes an intoxicating malt liquor and that the burden is upon the person claiming the defense to establish that in fact it is not an intoxicating liquor (*Rochester Brewing Co. v. State*, 26 Okla. 309, 109 P. 298).

Your letter indicated that the beer in question was a malt liquor type beer and, therefore, my opinion will assume that to be the fact.

A reading of §317.20 F. S., supra, would indicate that it was clearly the intent of the legislature to include with the term "intoxicating liquor" malt liquor beer. It is my opinion that any other interpretation of those terms would do violence to the purpose for which the act was passed, to-wit: the curtailing of the utter disregard of some people for the safety and welfare of others by recklessly driving dangerous instrumentalities on our highways while under the influence of intoxicants.

It is my opinion that this state would align itself with the majority of jurisdictions by holding that the term "intoxicating liquor" in §317.20, supra, includes malt liquor beer and that our courts would take judicial knowledge of that fact. Your question is therefore answered in the negative.

059-59—March 12, 1959

#### CRIMINAL PROCEDURE

#### ARRESTS—LAWFUL ARREST BY OFFICER WITHOUT WARRANT—§901.15, F. S.

To: *L. B. Vocelle, City Attorney, City of St. Sebastian, Vero Beach*

#### QUESTION:

Is it lawful for a police officer to arrest a person, without a warrant, on the charge of driving while under the influence of intoxicating liquors when said violation did not occur in the "presence" of the officer?

Section 901.15, F. S., reads as follows:

901.15 *When arrest by officer without warrant is lawful.*—

A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed a felony or misdemeanor in his presence. In the case of such arrest for a misdemeanor, the arrest shall be made immediately or on fresh pursuit.

(2) When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.

(3) When he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

(4) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution.

A reading of the above-stated section discloses a distinct difference between the power of an officer to arrest a person for a felony and to arrest a person for a misdemeanor. A police officer may arrest a person for a felony without a warrant where he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it (*Rogers v. State*, 158 Fla. 790, 30 So. 2d 625, 627; *Diaz v. State*, Fla. 1949, 43 So. 2d 13, 14).

The rule as announced above does not require that the offense be committed in the presence of the officer. Because of the serious nature of a felony, the legislature has vested in the law enforcement agencies the power of arrest where it is based on probable cause and the law does not require actual knowledge on the part of the officer.

The legislature has not seen fit to treat the arrest of a person for a misdemeanor in the same manner. As pointed out in subsection (1) of the statute, a misdemeanor must occur in the presence of the arresting officer. The rule requires that the officer must be able to detect the criminal act "by the use of one of his senses . . . as the act of the accused" (*Malone v. Howell*, 140 Fla. 693, 192 So. 224).

In the facts as related by you in your letter, the police officer heard what appeared to be an automobile collision and was informed of the person who was driving the car that caused the accident. Under such circumstances, I am of the opinion that the police officer was without power to arrest the defendant without a warrant.

It should also be noted that even if the facts in this case could meet the test of "presence," it is apparent that the arrest was not made "immediately or on fresh pursuit," as required by §901.15, *supra*, and, therefore, constituted an unlawful arrest without a warrant.



059-60—March 16, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
COUNTY FUNDS—EXPENDITURE FOR ELECTRICITY FOR  
STREET LIGHTS—§§336.01 AND 336.02, F. S.**

To: *W. L. Bailey, Attorney, Board County Commissioners, Liberty County, Blountstown*

**QUESTION:**

**May county funds be expended to pay an electric company for electricity furnished to provide streets lights in an unincorporated community within Liberty county? Said electric company would furnish all installations and county would pay only for current used.**

The establishment of a municipality, on territory over which passes a part of an existing county road, does not of itself revoke or suspend the duties of the county authorities over it (*State ex rel., Garrison v. County Comm. of Putnam County*, 23 Fla. 632, 3 So. 164).

In keeping with the above proposition it has been held that a bridge may be built with county tax funds within the limits of a municipality, where the bridge serves a county purpose. County funds may aid a municipality in constructing a bridge, where both a municipal and county purpose is served (*Skinner et al v. Henderson et al County Commissioners*, 26 Fla. 121, 7 So. 464). Thus, where a roadway serves both a county and municipal purpose, county funds may be used for its construction and/or maintenance.

As to what is a county purpose the authorities have formulated no general accepted definition, but leave each case involving the question to be decided as it may arise (*Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 So. 339).

In determining whether a particular expenditure is for a county purpose, the general test is whether the citizens of the county derive a benefit therefrom. That a municipality derives some incidental benefit is not controlling.

A public highway may be a state road both in name and ownership, but as to that portion which passes through a particular county it may be also, to all practical intent and purpose and in beneficent effect, a county road. Where a county purpose is served, a county may issue bonds to raise money to aid in the construction of state roads within the county (*Lewis v. Leon County, Fla.*, 107 So. 146). Municipalities have also been upheld in their participation in the construction of state highways through their cities (*Morris et al v. Farnell*, 171 So. 528).

Plenary judgment and discretion in providing public roads lies with the legislature (*Carlton v. Matthews*, 137 So. 815). The legislature in exercising its judgment and discretion has designated the county road system as all public roads outside municipalities not included in the state highway system or state park road system and such municipal connecting links and extensions as may be agreed upon by the board of county commissioners and municipal authorities (§336.01, F. S.) The board of county commissioners is invested with the general superintendence and control of county roads and structures within their respective counties and are required to keep the same in good repair (§336.02, F. S.)



Similar statutes have been held to operate as a removal to the state road department, of duties in connection with maintenance and repair of roads which that department designated as municipal connecting link roads of the state road system (*Leialoha v. City of Jacksonville*, 64 So. 2d 924).

The foregoing authorities and statutory provisions place a duty upon the board of county commissioners, among other things, to guard the safety of the vehicular and pedestrian users of county roads and public highways within the county. It is my opinion that where the safety of the citizens of the county require certain portions of the county road system to be lighted the board of county commissioners may properly expend county funds for this purpose.

Your question as presented is therefore answered in the affirmative.

059-61—March 17, 1959

**CORPORATIONS AND BUSINESS TRUSTS**  
**CORPORATIONS—SMALL BUSINESS INVESTMENT ACT OF**  
**1958—CHS. 517 AND 608, AND §659.52, F. S.**

To: *Philip McCallum, General Counsel Small Business Administration, Washington, D. C.*

**QUESTIONS:**

1. May a corporation be chartered under the general corporate statutes of Florida for the express purpose of operating under the small business investment act of 1958?

2. Where such a corporation is licensed by the small business administration to transact such a business may it operate in Florida in accordance with said act and the rules and regulations prescribed by the said administration?

3. Would such a corporation be subject to the Florida banking statutes?

Such a small business investment company, if incorporated in this state, would be within the purview of Ch. 608, F. S., which is a consolidation of former Chs. 610, 611 and 612, F. S., which former chapters were correlated by said Ch. 608 into one method of procedure for the creation and regulation of all types of corporations formerly dealt with in the three superseded chapters. Banking, insurance and other specially regulated business corporations are within the purview of Ch. 608, although they are required, in addition to complying with said chapter, to also comply with the statutory requirements made applicable to such corporations in addition to the general corporate laws and statutes. The corporate powers and authority are very broad under said Ch. 608, F. S., and may extend to most any type of corporate business, provided compliance is had with any other applicable statutes, such as the banking, insurance, etc., statutes.

The small business administration has compiled a suggested form of articles of incorporation for use in connection with the incorporation, under state statutes and laws, of small business investment companies, a copy of which is hereto attached as an exhibit. These proposed articles of incorporation have been

examined and studied in detail by this office and no reason is made to appear why such proposed form may not be used in this state. So long as a corporate charter remains in substance the same as the said proposed charter it would be sufficient as a charter in this state and would not encroach upon other regulatory statutes such as the banking, insurance and similar statutes.

We have also examined the rules and regulations adopted by the small business bureau pursuant to the small business investment act of 1958, now in force and effect, and find nothing therein conflicting with our corporate statutes and laws. It is clear that a corporation chartered in this state under a charter substantially the same as that proposed by the small business bureau and licensed by the small business administration may operate in this state under the rules and regulations prescribed by the said small business administration without violating our banking or insurance laws or other regulatory statutes so long as they comply with our usury statutes and similar regulations.

We come next to the application of our banking statutes to such corporations. In this connection it would seem proper that we determine what constitutes banking under the laws of this state. It is provided in §659.52, F. S., that "no person, other than banks, shall solicit or receive deposits, issue certificates of deposit, with or without provision for interest, make payment on check, issue or sell travelers checks, or money orders...or transact business in the way or manner of a commercial bank or trust company," within this state. This section in no way restricts or impairs "any right, authority or power granted savings banks, Morris plan or industrial banks or credit unions organized or operated under the laws of the state," or to building and loan associations. Generally, the powers and capacities of banks and trust companies are limited to those specifically granted by statute or which must be necessarily exercised in performance or enjoyment thereof (*Perkins v. Fuquay*, 106 Fla. 405, 143 So. 323, text 323-4).

In 9 C. J. S. 30, §1, it is stated that the business of banking, "as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making loans of money on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts deposited, buying and selling of bills of exchange, negotiating loans and dealing in negotiable securities...." To the same effect see also 7 Am. Jur. 25, §4. "Originally banking seems to have been restricted to the receiving of deposits. With the development of the business came the discounting of paper, the loaning of money and the other varied activities in which modern banks engage..." (*Marvin v. Kentucky Title and Trust Co.*, 218 Ky. 135, 291 S. W. 17, 50 A. L. R. 1337, text 1338). Banks are "...agencies through which the industry, trade and commerce of all civilized countries are carried on..." and are "of a preeminently public nature..." (*State v. Knight*, 89 Fla. 891, 124 So. 461, text 463). The fact that a corporation may exercise powers which a bank may exercise does not necessarily make it a banking institution (9 C. J. S. 30, §1, notes 30-33). The principal attributes of a bank have been said to be "the right to issue negotiable notes, to discount notes, and to receive deposits" (9 C. J. S. 31, §3). Although it may be that an institution exercising any one or more of these powers is

a bank in a strict commercial sense (*Oulton v. German Saving, Etc., Society*, 17 Wall. 109, 21 L. ed. 618) the mere fact that a corporation may do certain things a bank may do does not of that fact alone make it a bank (9 C. J. S. 31, section 3, note 42). It seems quite evident that a corporation of this state operating under a charter in substance the same as that suggested by the small business administration and within its rules and regulations would not be transacting a banking business in this state and would not be in violation of our banking statutes and laws."

Should any such corporation elect to issue securities in this state within the purview of the Florida sale of securities statute (Ch. 517, F. S.) it would have to comply with the requirements of such statutes.

We conclude that a corporation may be chartered under the general corporate laws of this state specifically for the purpose of operating under the small business investment act of 1958 (PL 85-699, 85th Cong.); and if licensed by the small business administration such corporation may operate in Florida under and in accordance with the provisions and purposes of the said act and regulations prescribed by the small business administration thereunder. Charters within the requirements of the small business investment act of 1958 and of your rules and regulations submitted to us seem to limit such corporation as to be within the framework of the Florida general corporate laws and would not constitute banking laws. The above stated three questions are therefore answered as follows:

Question 1 in the affirmative.

Question 2 in the affirmative; and

Question 3 in the negative;

in that their operation would not be within the banking statutes.

059-62—March 18, 1959

### CRIMINAL PROCEDURE

CLERKS OF COURTS—FEES FOR FURNISHING ADDITIONAL COPIES OF COMMITMENT PAPERS—§§28.24, 28.241(2), 32.12(1), 32.14(1), 922.01, 944.16-944.18 AND 947.141(1), (4), F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. What is the fee of the clerk of the circuit court or the clerk of the criminal court of record for issuing the necessary papers which accompany a prisoner to the reception and classification center of the department of corrections?

2. Are said clerks entitled to fees under §28.24, F. S., for additional copies of these papers furnished to the director of the department of corrections, or the parole commission?

#### AS TO QUESTION 1:

All prisoners delivered to the department of corrections are received at a reception and classification center. No prisoner may be received unless the officer having such prisoner in charge also delivers a commitment in due form issued by the authority of the court committing such prisoner (§944.16, F. S.).

The commitment above referred to is the uniform commitment form which the clerks are required to use (§944.17, F. S.), together with a certified copy of the indictment or information upon which the prisoner was convicted (§944.18, F. S.) and a copy of the sentence (§922.01, F. S.). These instruments comprise the commitment papers necessary to give effect to the sentence of the court wherein the prisoner was convicted.

Careful examination of said §§922.01, 944.17 and 944.18, indicate that the requirement of §944.16, as to commitment papers is satisfied with one original of the uniform commitment form, one copy of the sentence and one certified copy of the indictment or information upon which a prisoner was convicted.

Sections 28.241(2), 32.14(1) and 32.12(1), F. S., provide flat filing fees for all services performed by the clerks in connection with criminal proceedings in the circuit court and the criminal court of record.

Inasmuch as the above designated papers are necessary to complete a criminal proceeding by carrying out the execution of the sentence, it is my opinion that the clerk's fee in connection with these papers is included in the flat filing fee provided by the applicable statute in connection with criminal actions.

#### AS TO QUESTION 2:

In this state "public officers have no claim for official services rendered, except when and to the extent that, compensation is provided by law, and when no compensation is so provided the rendition of such services is deemed to be gratuitous" (*Rawls v. State*, 98 Fla. 103, 122 So. 222; see also *Gavagan v. Marshall*, 160 Fla. 154, 33 So. 2d 862, text 864 and authorities cited).

It is also generally held that the state and its agencies are not within the purview of a statute, however general or comprehensive the language used, unless an intention to include the state and its agencies is clearly manifest (82 C. J. S. 554, §317; §6301 *Sutherland Statutory Construction*, 2nd Ed., p. 183, et seq.).

The compensation of the clerk, as clerk or recorder is entirely by fees, and unless otherwise provided, the clerk's fees are as provided by §28.24, F. S. Careful examination of this statute fails to reveal express provision authorizing the clerk to charge the designated fees against the state or its agencies. Nor do §§922.01, 944.17, 944.18 or 944.16, F. S., provide the necessary authority to charge the clerk's fees against the state or its agencies.

I point out that the department of corrections is an agency under direction of the board of commissioners of state institutions. Its authority to make payment for purchases or services is dependent upon legislature appropriations. Unless an appropriation may be pointed out authorizing the department of corrections to procure such copies and pay for the same, there is serious doubt that payment therefor would be authorized. Although the department of corrections is not expressly authorized to secure or pay for additional copies of the commitment papers, that department would not be prohibited from making additional copies of these papers if they are needed for internal distribution within the department.

#### AS TO THE PAROLE COMMISSION:

It is the duty of the parole commission to obtain such information as is necessary for the performance of its functions, and



upon request of the parole commission it is the duty of the court to furnish such information and copy of the minutes or other records as may be in its possession or control (§947.14(1), (4), F. S.)

In A. G. O. 041-630, biennial report 1941-1942, p. 788, the above section was held not to authorize a fee of the clerk of the circuit court in connection with the clerk's furnishing copies of papers to the parole commission. It is also my understanding that it has been the long-standing policy of the clerks to furnish the parole commission copies of the commitment papers, when requested to do so, without charging a fee.

In view of the above authorities it is my opinion that the clerks would not be authorized to charge for additional copies of the instruments considered in the answer to question 1 when such copies are furnished to the parole commission, and that the department of corrections appears to have no authority to require the clerk to furnish additional copies of said instruments.

Question 2 is answered accordingly.

059-63—March 23, 1959

#### BEVERAGE LAW

##### LOCAL OPTION—ELECTION, QUESTIONS ON BALLOTS—

§§1 and 2, ART. XIX, STATE CONST.; CH. 567 AND

§§561.20, 567.06, 567.13 AND 569.04, F. S.

To: *Wilson Carraway, Senator, Tallahassee*

##### QUESTION:

Could the legislature, by a local act, provide for a local option election in a county to decide whether the sale of intoxicating liquors, wines or beer shall be permitted or prohibited therein, and in such local bill provide for the form of the ballot as follows:

NO. 1

For selling intoxicating liquors, wines or beer

Against selling intoxicating liquors, wines or beer

NO. 2

For sales by the package and drink

For sales by the package only

NO. 3

For sale only in private clubs and in hotels having fifty guest rooms and restaurants occupying in excess of 4000 square feet of space.

Section 1 Art. XIX, State Const., provides:

The Board of County Commissioners of each County in the State, not oftener than once in every two years, upon the application of one-fourth of the registered voters of any County, shall call and provide for an election in the County in which application is made to decide *whether the sale of intoxicating liquors, wines or beer shall be prohibited therein*, the question to be determined by a majority of those voting at the election called under this Section, which election shall be conducted in the manner prescribed by law for holding general elections. Elections under this Section shall be held within sixty days from the time of presenting said application, but if any such election should



thereby take place within sixty days of any State or National election, or primary, it shall be held within sixty days after such State or National election or primary. (As amended, general elections, 1918 and 1934). (Emphasis supplied.)

Chapter 567, F. S., having to do with local option elections, relating to the petition, the notice of election, etc., sets forth the questions which shall appear on the ballot and that chapter also provides detailed machinery for holding the election, canvassing the votes and even provides for the form of the ballot. This chapter was enacted pursuant to §1, Art. XIX and it limits the questions to be decided by the electors to two propositions. Section 567.06 provides in part as follows:

QUESTION NO. 1:

|   |                          |
|---|--------------------------|
| For Selling Intoxicating Liquors, Wines or Beer | <input type="checkbox"/> |
|---|--------------------------|

|   |                          |
|---|--------------------------|
| Against Selling Intoxicating Liquors, Wines or Beer | <input type="checkbox"/> |
|---|--------------------------|

QUESTION NO. 2:

|                                    |                          |
|------------------------------------|--------------------------|
| For Sales by the Package and Drink | <input type="checkbox"/> |
|------------------------------------|--------------------------|

|                               |                          |
|-------------------------------|--------------------------|
| For Sales by the Package Only | <input type="checkbox"/> |
|-------------------------------|--------------------------|

(2) No vote on question number two shall be counted or considered in determining the results on said question unless the elector casting said vote shall have voted also upon question number 1; provided that:

(a) If a majority of those legally voting at said election cast their votes on question number one, the vote of said majority shall be determinative of said question and the votes cast on question number two shall in no way affect or nullify the result of the vote on question number one; provided that:

(b) A majority of votes legally cast on question number two shall be determinative of said question and the number of votes cast on question number one shall in no way affect or nullify the result of the vote on question number two, unless a majority of the votes legally cast at said election shall be "Against selling intoxicating liquors, wines or beer"; ....

It follows there is no authority in existing law for the third proposition presented in your question. We believe there is a sound constitutional reason for this absence of authority. This is so because it is doubted that the legislature could even by general law provide for submission of additional questions on the ballot as to "where" and by "whom" the intoxicating liquors may be sold. The electors thereunder would be required to vote on a complex question or a group of questions not contemplated by the provisions of §1, Art. XIX, State Const. This type of question goes more to the method of regulating the liquor business and that authority has been delegated to the legislature by §2, Art. XIX, State Const. and once the electors have voted not to prohibit intoxicating liquor in a particular county, then the legalized subject matter may be "regulated" by any general, special or local law. This is

especially true when we consider the present law with respect to (a) clubs (b) restaurants and hotels.

Section 569.04, F. S., makes it unlawful for the holder of a club liquor license to sell intoxicating liquors and beverages *except* by the drink.

Under the provisions of §561.20, F. S., hotels and restaurants of the size mentioned in your request may secure a special license, outside of the limitations of one license for every 2,500 persons in the county where liquor sales are authorized, for service to its guests; however, restaurants securing these special type licenses are limited to sales by the drink only (§561.20(1), F. S.).

In Highlands county the electors voted against prohibiting the sales of intoxicating liquors in the county but voted to limit sales to the "package only." The beverage department has issued only "package store" licenses in the county and therefore hotels and restaurants securing a license in Highlands county are limited to sales by the "package only." In other words, no licensee in Highlands county can sell less than a half pint in a sealed container, and cannot permit the intoxicating beverage thus sold to be consumed on the licensee's premises (§567.13, F. S.).

In the light of the foregoing, it is my opinion that your question is properly answered in the negative.

It is recognized that once a county, under §1, Art. XIX, State Const., has permitted the sale of intoxicating liquors, then the legislature may regulate the sale so long as it stops short of prohibition (Ex Parte Lewinsky, 66 Fla. 324, 63 So. 577). This regulation, which is authorized under §2, Art. XIX, may be provided by the legislature either by general, special or local legislation as it may deem best for the public welfare short of actual or practical prohibition of the subject matter legalized (Ex Parte Pricha, 70 Fla. 265, 70 So. 406, and State ex rel Wilder v. City of Jacksonville, 157 Fla. 276, 25 So. 2d 569).

Other than what has already been said, the placing of a third proposition on a local option ballot might be unconstitutional as denying the elector equal protection of the laws. If for example the majority voted not to prohibit the sale of liquor in a given county but authorized sales only in private clubs, hotels or restaurants of designated sizes, such a course of action could well be practical prohibition of the legalized subject matter to many persons.

059-64—March 24, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—RIGHTS OF RETIREES AS TO  
EMPLOYMENT BY COUNTY EMPLOYEE—CH. 122  
AND §122.16, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a person retired under the state and county officers and employees retirement system be employed by a physician employed by the county to perform medical services for the account of the county, without being subject to the provisions of §122.16, F. S.?

Under §122.16, F. S., "any person who has accepted and is receiving retirement compensation under this chapter (Ch. 122,

F. S.,) shall have such compensation suspended during any period of *re-employment in any capacity whatever* by the state or any political subdivision or any department, branch or agency thereof." If we understand the question, the physician in question, being in need of some type of aid or assistance in his work as a physician, employed the person in question to render such assistance to him. Although the physician is paid, in whole or in part, by the county for the professional services rendered the county, the said employee is not paid by the county but by the physician from the income of his office, a part of which is derived from payments made to the physician by the county for services rendered.

When payment is made to the physician by the county the proceeds of such payment become the funds and property of the physician and not of "the state or any political subdivision or any department, branch or agency thereof," unless such funds are provided by the county specifically for his employment or services by the physician as agent or representative of the county. Said §122.16, F. S., does not seem to follow the compensation paid employees or contractors of the state or its subdivisions, etc., into the hands of their employees, unless they are in fact employees of the state or one of its subdivisions, etc., and not of such employee or contractor.

The above stated question is, therefore, answered in the affirmative; unless the employment by the physician is in law and fact actually state or county, etc. employment and not private employment.

059-65—March 24, 1959

#### TAXATION

NON-PROFIT CORPORATION—EXEMPTIONS, OBJECTS OF CORPORATION AS EXPRESSED IN CHARTER—§1, ART.

IX, §16, ART. XVI, STATE CONST., CH. 617 AND  
§192.06 F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the charter of a corporation organized in this state under Ch. 617, F. S., as a corporation not for profit, states that the general nature and object of the corporation is for some religious, scientific, municipal, educational, literary or charitable purpose, is the real and tangible personal property of such corporation entitled to exemption from taxation?

Under §1, Art. IX, State Const., the legislature is authorized to exempt "such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes;" and §16, Art. XVI, of the same constitution, provides tax exemption for corporate property "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Section 192.06, F. S., was enacted under the authority granted the legislature under §1, Art. IX, State Const. Under these constitutional and statutory provisions *ownership and utilization* of the property, not merely ownership, are the criteria for determining its exemption from taxation (*Riverside Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303;

State v. St. John, 143 Fla. 146, 161 So. 78; Univ. Club v. Lanier, 119 Fla. 146, 161 So. 78; Orange County v. Orlando Osteopathic Hosp., Fla., 66 So. 2d 285).

The general purpose clause in the charter of the non-profit corporation in question provides that "The general nature and object of this corporation shall be to encourage, and assist through research, education and practice, retirement age adults to become healthier, happier, long lived and more useful citizens; and to acquire and disseminate trustworthy information bearing upon these topics, to acquire, own, hold and dispose of such personal property, and own real property for its own use as may be necessary to properly carry into effect the objects and purposes herein set forth, and to perform all other such acts and things as may be necessary to the full carrying out and into effect the said purposes and objects, that said purposes do not include operations for pecuniary profit." This charter provision, although of some weight in determining the purpose, nature and objects of the corporation, is not sufficient to show that the property claimed to be exempt is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," within the purview of the above mentioned constitutional and statutory provisions.

Before the non-profit corporation in question, or any non-profit corporation, may be granted tax exemption it must, by and through its agents, unless otherwise readily evident to the tax assessor (such as a church house regularly used for church services), prove to the satisfaction of the tax assessor, or the board of tax equalization or the court upon appeal from the tax assessor's ruling, that its property, claimed to be tax exempt, is actually *being held and used exclusively* for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., above set out.

The above question must be answered in the negative; unless and until it shall be made to appear to the taxing authorities that the property claimed as exempt is being held and used exclusively for one or more of the purposes above mentioned. The charter of the owner corporation does not of itself prove right to tax exemption under the above constitutional and statutory provisions.

059-66—March 27, 1959

### TAXATION

OIL AND GAS PRODUCTION TAX—CONSTRUCTION OF  
§§211.02 AND 211.13, F. S.—§§200.021 AND 192.04, F. S.

To: Board of County Commissioners, Everglades

#### QUESTIONS:

1. May a county tax assessor increase the value of real property located in areas where there is reasonable evidence that oil and gas may lie under such real property?
2. May a county tax assessor increase the value of real property located in areas where oil and gas are being produced?
3. May equipment and machinery in connection with producing oil and gas wells for the purposes of taking or producing oil and gas therefrom be subjected to ad valorem taxes as tangible personal property?



4. May equipment and machinery used in connection with the drilling of a well in search of oil or gas be subjected to ad valorem taxes as tangible personal property?

Section 211.02, F. S., imposes a *first* and *second* oil and gas tax upon oil and gas mined and produced in this state; the first oil and gas tax being a state excise tax and the second oil and gas tax, a county excise tax. Section 211.13, F. S., provides that (1) the "several tax assessors of this state and of the cities therein, when assessing the value of any land for ad valorem taxes, shall not increase the value thereof by reason of the fact that there may be oil or gas under the surface of such land, inasmuch as it is impossible under known valuation methods to accurately ascertain the true value of oil and gas in place . . ." which provision answers question 1 in the negative;

(2) That "the value of land for ad valorem tax purposes shall not be increased by reason of the location thereon of any producing oil or gas equipment or machinery used in and around any oil or gas well and actually used in the operation thereof," which provision, when considered in the light of the statutory provision above quoted under (1) above, answers question 2 in the negative;

(3) Said statute further provides that "no ad valorem tax shall be imposed upon such producing equipment and machinery," which answers question 3 in the negative.

This brings us to question 4, which involves equipment and machinery used in connection with the drilling and mining operations prosecuted in connection with the drilling of a well to determine whether oil and gas may underlie the lands where the operation is carried out. Such equipment and machinery are not producing equipment and machinery, but prospecting and mining equipment used in drilling a well which may never become a producer of oil and gas, or either. Only the equipment and machinery used in connection with the pumping and taking of oil and gas, or either, from the earth may be said to be producing equipment and machinery. These observations suggest an affirmative answer to question 4; provided such equipment and machinery have acquired a tax status in this state. Section 192.01, F. S., provides that "all . . . personal property *in this state* . . . shall be subject to taxation in the manner provided by law." The Florida taxing statutes are broad and comprehensive, and "when interpreted and applied under the provisions of the Constitution, include all personal property, *tangible* and *intangible*, that may *legally have a taxing situs in this state*." (Emphasis supplied.) (*Wood v. Ford*, 148 Fla. 66, 3 So. 2d 490, text 493-494). Tangible personal property when put to such a use in this state as to impress it with a local character, although owned by a nonresident, acquires a local taxing situs in this state (*Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, text 681). This case involved a large seagoing dredge and other smaller dredges brought into this state around June 1934, for the purpose of performing dredging contracts for the Everglades drainage district, and had been in the state performing such duties from said June 1934 until placed on the tax rolls in 1935, which the court held to give such property a taxable situs in this state; the dredges continued such services through Dec. 1935 and into 1936. See also *Bush v. State*, 140 Fla. 277, 191



So. 515, involving a vessel used by its owners as a yacht which had been in Florida for several years.

Although tangible personal property in this state is taxable as of January 1 of the tax year (§192.04, F. S.), to be taxable it must have acquired on or before that date, and continued to have, a taxable situs in this state. Generally tangible personal property is taxable at the domicile of its owner; however, where it is kept permanently or for a long period of time at another location it may, and often is held to have acquired a taxable situs of its own (84 C. J. S. 224, §115). "In determining taxable situs involving the physical location of the property, it has been held that 'actual situs' means a little more than simply the place where the property is, and excludes the idea of mobile personal property which happens to be in the course of transit through the taxing state, or the idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time, although it does not demand or necessarily involve the idea of permanency or permanent location in the taxing state, or permanency in the sense that it must be fixed like real property, but seems generally to be that it must have a more or less permanent location as distinguished from a transient or temporary one. Hence, as the habitual employment of the property in the state is the basis of jurisdiction to tax property belonging to a nonresident, it is sufficient for the establishment of a taxable situs for tangible personal property, when in the ordinary course of business that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily, or where the location of the tangible personal property in the state is of such permanence that the property can be regarded as a part of the property of the state." (84 C. J. S. 225-6, §115).

Section 200.021, F. S., provides that "all *taxable* tangible personal property . . . located in the state between January first and March first in each year shall be taxable for said year" in the county of its situs. For this section of the statute to be applicable the property *must have acquired a taxable situs in this state* under the above rule, unless its owner be a resident and citizen of the county. Taxable situs is necessary for taxation even under this section. If the property in question had acquired a tax situs in one county of this state it should be taxed there even if moved to another county prior to March 31 of the same year.

Questions 1, 2 and 3 above are answered in the negative. The answer to question 4 depends upon whether or not the property had prior to assessment acquired a tax situs in this state; if so, it is taxable, but if not, it is not taxable.

059-68—April 10, 1959

#### LEGISLATION

EFFECT OF 1960 FEDERAL DECENNIAL CENSUS UPON POPULATION ACTS ENACTED PRIOR TO SAID DATE—  
§5, ART. VII, STATE CONST.

To: Wayne E. Ripley, State Senator, Tallahassee

#### QUESTION:

What effect, if any, will the 1960 federal census, which is also a state census under §5, Art. VII, State

**Const., have upon counties whose population brings them within so-called population acts heretofore enacted with other counties in mind?**

Past legislatures have enacted hundreds, and maybe thousands, of laws based upon county population, many of such laws being applicable to counties falling within population spreads of only a few; some with spreads of one or two hundred, some with spreads of several hundred, some with spreads of a few or many thousand, and others being applicable to all counties having a population of in excess of a fixed number. The constitutionality of many of such acts are questionable; however, only a small percentage of such acts has ever been questioned in the courts on constitutional grounds. The majority of such acts has been operated under. The validity of such acts on constitutional grounds has in substantially all, if not all, instances not been passed on by administrative officers, but has been left to the courts.

Upon the taking of each state or federal census during the last 30 or more years unsuspecting counties have grown into one or more of such population acts without the officers and agents thereof being advised that they have grown into such population acts. This has caused many county and local officers embarrassment and state and other officers, difficulties; for example, the state auditor in determining applicable statutes, laws and population acts. Counties or officers may find that population acts have embraced them, unknown to them until months or maybe years later, sometimes requiring refunds of fees and compensation because of the advent of population laws unknown to them; sometimes the collection of insufficient fees when fees different from those used by them have been imposed through such population acts. Under federal statutes the population count is taken as of a fixed day, on or near the beginning of the population count; however, if this date is to be considered as the effective date under population acts for counties growing into a population act, difficulties are encountered.

From the above and foregoing, it seems clear that any state or federal census for the entire state presents divers and numerous difficulties concerning and in connection with population acts where counties grow into such acts because of the census. These difficulties suggest the need for legislation regulating the effective date of population acts as to counties coming within their purview because of the census. Due to the fact that counties may grow into acts unsuited for them, or even acts that present difficulties to or concerning them, one suggestion would be a general act fixing an effective date for the application of such act to counties brought within its purview by reason of the census at such a time or date as will permit the county to seek legislation avoiding the application of such act to them by reason of the census. One suggestion would be July 1 of the year following the taking of the regular 10-year census. This would permit legislation before the act becomes effective, and would give the county or officers affected time to seek legislative protection against the population act.

Another suggestion would be a general act relating to all population acts providing that their brackets under preceding censuses making them operative as to particular counties are

amended by said general act so that from after the date the 1960 federal census became official such population acts would thereafter carry population brackets under the 1960 federal census which relate to the same counties prescribed in the original population acts and directing the attorney general through his statutory revision to assign an appropriate population bracket to each existing population act to carry out such transition, the same to be certified to the secretary of state and the county commissioners of the affected county or counties. Or the matter could be handled by a constitutional amendment to remove questions of constitutionality by authorizing the legislature to accomplish the transition in any manner it saw fit.

059-69—April 13, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATION  
COUNTY SEATS—CHANGE OF LOCATION—CONSTRUCTION  
OF §138.10, F. S.**

To: *Harold S. Smith, County Attorney, Naples*

**QUESTION:**

What effect, if any, would the provisions of §138.10, F. S., have on a change of location of a county seat where additions and alterations have been made to the courthouse within the 20-year period prior to the filing of a petition for change of location of the county seat with the board of county commissioners?

Section 138.10, F. S., provides:

*Counties having constructed a new courthouse within twenty years.*—The provisions of this chapter shall not apply to any county having constructed a new courthouse within the past twenty years, other than a county having constructed a courthouse of wood, in which the county seat is situated, in any town or city not located on any line of railroad transportation.

The cases which have dealt with this section have not considered the effect of additions or alterations during a 20-year period immediately preceding the filing of a petition for an election to change the location of the county seat. See *Collier v. Cassidy*, 63 Fla. 390, 57 So. 616, *Taylor v. State*, 73 Fla. 601, 74 So. 875.

This section in clear and unequivocal language eliminates counties which have constructed a new courthouse within the past 20 years, except where a courthouse constructed during that period is of wood and in a county seat not located on any railroad. No mention is made of other county buildings, such as jails, etc.

Thus, the answer to your question turns on whether the additions and alterations to an existing courthouse within the 20-year period are so substantial that it can be determined that the present building is in fact a new courthouse. Although the amount of money spent by the county in such a program may be some indication as to whether the renovations and additions result in a new courthouse, I do not believe this fact alone would control the determination of your question.

As pointed out above, this question has not been considered by the Florida courts; however, almost identical language ap-

pears in an Alabama statute and was construed in the case of *Dennis v. Prather* by the supreme court of Alabama Jan. 27, 1925, 212 Ala. 449, 103 So. 59. The following quoted language of this case appears applicable to the provisions of §138.10, F. S.:

The provision excepting counties in which a new courthouse has been built within 20 years has the manifest purpose of preventing the additional burden of erecting new public buildings at the expense of the taxpayers of the county. This purpose should guide us in construing this provision. Seeking to give the term "new courthouse" its natural meaning in the connection used, it does not include a case of repairs and minor alterations or additions wherein the original building retains its identity. Neither does it exclude a building in which some considerable portion may remain intact and be incorporated in the new structure. In passing upon the question of fact whether there was a new courthouse built in Russell County, the opinions expressed in the bill or answer or in the affidavits carry no great weight. From the detailed statements of the changes, enlargement, and reconstruction of the building, as shown by the affidavits, we are convinced a new courthouse, within the meaning of the law, was built in Russell County.

It follows that no removal of the county seat of Russell County can lawfully be made; that no lawful election can be held for that purpose; . . . An election under such conditions would be a mere straw vote, having no legal effect if attacked in a proper proceeding by proper parties. All the expense and inconvenience to the voters and taxpayers of the county would be useless.

The decision in this suit involving the reconstruction of an existing courthouse sets forth the following affidavit as the basis of that court's opinion.

That a part of the courthouse building then standing was used for the construction of the new courthouse now standing, to wit, the old north wall, the old east wall, and the old south wall of said building, but that the foundations to these several walls were not sufficient for the new building being erected, and new foundations to these several walls had to be made; that the west wall and portico and pillars of said building were torn down, and an entirely new and enlarged west end, consisting of four entirely new offices and halls and stairways were constructed; that the three walls above referred to were the only material of the old courthouse which was used in the construction of the present courthouse; that the concrete foundation of the present courthouse, all of its floors, ceilings, side walls, partitions, jury rooms, and witness room, the entire roof, windows, doors, stairways, and banisters, vaults, seats, judge's stand, and clerk's desk, and lighting system were constructed of new and different material from that used in the old courthouse; that every room and office in said building is now an entirely new room or office.

In view of the similarity of language of the Alabama and Florida statutes, it is entirely possible that the Florida supreme



court, when considering facts that were before the Alabama court, would arrive at the same interpretation. However, I hasten to point out that the question of fact as to whether the construction of additions and alterations to an existing courthouse results in the construction of a new courthouse within the provisions of the statute can only be finally determined by a court of competent jurisdiction, considering all the facts of each particular situation. My recommendation would be that this matter be settled by the courts, and the appropriate action would appear to be a taxpayer's suit.

Your question is answered accordingly.

059-71—April 13, 1959

**TAXATION**  
**EXCISE TAX ON DOCUMENTS—CONSTRUCTION**  
**OF §201.08(1), (2) F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**STATEMENT OF FACTS:**

A banking institution in this state sets up a loan plan whereby the customer executes and delivers his promissory note in a certain amount (for example \$600.) for the purpose of establishing a line of credit with the bank for that amount. He is given the right to check on that account so long as his obligation to the bank never exceeds the amount of the said note. His obligation to the bank is paid in equal installments. His line of credit with the bank is restored in whole or in part by such payments. Such line of credit is usually established for a period of 12 months; his obligation on the note appears to be determined by the unpaid balance on the arrangement at the end of the year. The purpose of the note is to secure the line of credit. His credit is restored from time to time as deposits or payments are made upon the balance due by him from time to time upon the account.

**QUESTION:**

Is a promissory note given under the above stated circumstances and for the purposes stated subject to taxation under subsection (1) or subsection (2) of §201.08, F. S.?

Section 201.08(2), F. S., provides an excise tax "on promissory notes, non-negotiable notes, written obligations to pay money or other compensation made, executed, delivered, sold, transferred, or assigned in this state, *in connection with sales made under retail charge account services, incident to sales which are not conditional in character* and which are not secured by mortgage pledge of purchaser. . . ." (Emphasis supplied.)

We find nothing in the statement of facts above, or in your letter, indicating that the note in question is to have any "connection with sales made under retail charge account services incident to sales . . .," so as to be within the purview of said subsection (2). Taxes should, therefore, be imposed pursuant to subsection (1).

059-72—April 13, 1959

**TAXATION****REDEMPTION AND ASSIGNMENT OF TAX SALE CERTIFICATES—§211.14, F. S.***To: James F. Taylor, Jr., Clerk Circuit Court, Tampa***QUESTION:**

**What disposition should the clerk make of an application, by the owner and holder of a mineral right or interest in tax delinquent lands, under §211.14, F. S., for the issuance of a duplicate certificate?**

Section 211.14, F. S., is a substantial duplicate of §14, Ch. 22784, 1945, which was replaced by said §211.14, derived from Ch. 23883, 1947. Said §14 of the 1945 act was upheld by the supreme court of this state, in so far as the issuance of the duplicate certificate is concerned (*Steele v. Steele*, 157 Fla. 223, 25 So. 2d 501). In the light of this opinion it is merely the administrative duty of the clerk of the circuit court, under the provisions of §211.14, F. S., to receive the money "for the redemption of the tax certificate" and pay the same over to the tax certificate holder "and thereupon to cancel the certificate." It is his further duty under the provisions of said §211.14, to issue to the applicant a duplicate of the original tax sale certificate. "Whether or not" the duplicate certificate "can be enforced against the owner of the surface fee is a matter in which the clerk of the circuit court has no interest and for which he can be held in no way pecuniarily answerable to any party at interest."

"If the statute . . . is valid as between the owner of the surface fee and the owner of the mineral rights (which question was left undecided by the court in the above case) then the owner of the mineral rights may proceed to protect his interest as is provided in the statute, and, if the statute is not valid in this regard, then he may proceed in any manner that may be available to him under valid law to determine and adjust the rights of the owners of the respective interests in such lands." (*Steele v. Steele*, supra).

As an application has been made for a duplicate certificate under said §211.14, F. S., with a check proffer in payment, you appear, under the opinion in *Steele v. Steele*, supra, to be required to comply with the application. However, you should, either before or after the issuance of the duplicate certificate notify both the surface and subsurface owners thereof.

059-73—April 13, 1959

**BEVERAGE LAW**

**REGULATION AND CONTROL OF ALCOHOLIC BEVERAGES  
BY MUNICIPALITIES—FINGERPRINTING OF OWNERS  
AND EMPLOYEES OF PLACES OF BUSINESS SELL-  
ING OR DISPENSING THE SAME—§§561.44(1),  
562.14(3) AND 562.45, F. S.**

*To: W. H. Hamilton, Jr., Detective Lieutenant, Winter Haven***QUESTION:**

**May the city of Winter Haven pass an ordinance requiring the fingerprinting of all owners and employees of**

**places of business which sell or dispense alcoholic beverages?**

Under the beverage laws relating to the regulation of alcoholic beverages, §561.44(1), F. S., cities and towns are given authority to zone the location where vendors of alcoholic beverages may be permitted to conduct their places of business.

Section 562.14(3), F. S., allows the cities and towns by ordinance to regulate the hours of sale of alcoholic beverages and §562.45, F. S., allows cities and towns to regulate by ordinance the sanitary conditions under which beverages may be dispensed.

Our court in the case of *Simpson v. Goldworm* (Fla.), 59 So. 2d 511, held that a municipality has only such power, respecting the regulation and control of alcoholic beverages, as is given it by the legislature and on several occasions has ruled that a city or municipality's authority over alcoholic and intoxicating beverages is limited to three things, (1) controlling the hours of sale, (2) zoning the locality in which the alcoholic beverage business may legally operate, and (3) regulating the sanitary conditions under which the beverage shall be dispensed or served to the public.

The supreme court of Florida held in the case of *City of Miami v. Kichinko*, 156 Fla. 128, 22 So. 2d 627, that the legislature, in enacting the state beverage law, intended to inhibit all powers of the municipality over the subject of intoxicating liquors except those powers specifically enumerated.

In the case of *Simmons v. Hanton*, 65 So. 2d 42, the court held that in a situation where a statute required the racing commission to make rules and regulations pertaining to the holding, conducting and operating of all race tracks and race meetings in the state, the commission was within its authority to enact a rule requiring all persons who actively participated in racing activities to furnish their fingerprints and photographs for the commission files and held that such a rule was reasonably designed to effectuate the mandatory duty imposed on the commission to exercise strict control over the entire operation of the racing business.

It is true that a permit to operate a race track and a license to engage in the liquor or the beer business are each a privilege rather than a right and the state can exercise greater control and can exercise its police power in a more arbitrary manner because of the noxious qualities of these enterprises as distinguished from businesses not affected with a public interest and over which the exercise of the police power is not so essential for the public welfare. (*Hialeah Race Course v. Gulfstream Park*, 37 So. 2d 692).

However, in the light of the *Kichinko* case, *supra*, we believe that before such an ordinance could be adopted, special legislative authority would be necessary.

This opinion is, of course, reached on the assumption that neither the city charter nor any other special or local law relating to the regulation of alcoholic beverages authorizes the city of Winter Haven to enact such an ordinance.

059-74—April 13, 1959

### CORRECTIVE DIVISIONS

#### SENTENCES—FINES—REDUCTION OF IMPRISONMENT BY PARTIAL PAYMENT—§951.16, F. S.

To: *R. O. Culver, Division of Corrections, Tallahassee*

#### QUESTION:

When a state prisoner has been sentenced to pay a fine and, in default of such payment, to serve a stipulated time in the state prison, is such prisoner entitled to receive credit on the fine in proportion to the time served in the event that he should desire to obtain his release after serving a part of the alternative prison sentence?

I do not find any statute governing this subject. Section 951.16, F. S., provides that a person imprisoned in a county jail for failure to pay a fine and costs, or either, shall be entitled to receive credit thereon in proportion to the time such person may be imprisoned, but the terms of this statute specifically restrict its operation to persons imprisoned in the county jail and the statute has no application to persons imprisoned in the state prison.

36 Corpus Juris Secundum 793, Fines, §12, says:

Reduction of imprisonment by partial payment. It has been held that one committed for non-payment of a fine must remain in custody for the whole of the term fixed in the sentence, unless the whole fine is sooner paid, and that the prisoner is not entitled to a reduction of his term for partial payment of the fine.

In the light of this pronouncement, and in the light of the fact that although the legislature has enacted §951.16 to cover county prisoners, it has made no similar provision with respect to state prisoners, it is my opinion that your question is properly answered in the negative.

059-75—April 14, 1959

### TAXATION

#### TAX LIABILITY OF FOUNDATION ESTABLISHED FOR EL- EEMOSYNARY AND PUBLIC PURPOSES—§1, ART. IX AND §16, ART. XVI, STATE CONST., AND §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Is a foundation established under a trust indenture vesting title to certain described real property, together with such other property as may thereafter be added, such property to be "operated and administered exclusively . . . for religious, scientific, literary, educational and public purposes," entitled to tax exemption in this state?

The trust foundation in question is made perpetual by the trust agreement; the trustees are vested with power to "take, hold, receive and administer the trust estate for any and all charitable uses and purposes, the particular charitable use or purpose, or combination of any thereof, to be determined at the sole and uncontrolled discretion of the trustees; and the whole of said trust estate, principal and interest, shall be devoted to, given, granted,



distributed, or made the subject of loans, with or without interest, and otherwise administered solely to accomplish such charitable uses and purposes." The trustees are given power to sell and to invest and reinvest the trust property or properties. The cost and expenses of administration of the trust is payable from trust funds and property. Assistance to individuals seeking an education is declared to be within the purview of the trust purposes. Gifts may be made to governmental agencies or authorities for public purposes, including park, playground and recreational purposes. Gifts may be made for the purpose of "promoting scientific, educational, religious or literary study or research" from the trust. A reading of the entire trust agreement shows clearly that the expressed purpose of the trust foundation is for religious, charitable, scientific, literary, educational and public purposes." We construe the term "public purposes," as used above, to be tantamount to "municipal purposes" as used in §1, Article IX, and §16, Article XVI, State Const.

We, therefore, construe the trust foundation as requiring that the property held by the said trust shall be held and administered for "religious, scientific, municipal, educational, literary or charitable purposes." Section 16, Art. XVI, State Const., expressly requires that for property to be exempt from taxation thereunder it must "*be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.*" Before property may be allowed exemption under §1, Art. IX, State Const., it likewise must be used for like purposes.

Under said §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., *ownership and utilization* of the property are the criteria for determining its exemption from taxation. Its right to exemption is to be determined, not by the ownership and purposes alone, but by both the *ownership and use*; that is the use to which the property is actually put (*Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406; *Riverside Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummas v. Fla. Adirondack School*, 123 Fla. 810, 168 So. 232; *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78; *Rast v. Hulvy*, 77 Fla. 74, 80 So. 750). Ownership is not sufficient; there must also be utilization for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. Although property may be owned and held by an eleemosynary corporation, trustees, or otherwise, for one or more of the purposes mentioned in said sections of the state constitution, such ownership and purposes are not of themselves sufficient for tax exemption; there must also be a use for said purposes.

*Simpson v. Bohon*, supra, involved the lodge building of the Jacksonville Lodge No. 221, of the Benevolent and Protective Order of Elks in Jacksonville; however, the net income of the building was used toward payment of a mortgage encumbering the property, with another large sum being invested in bonds. As stated by the court, "the stern fact is that not one dollar of this huge fund found its way into the charity fund." The property was held subject to taxation. In the *Univ. Club v. Lanier* case, supra, the primary purpose of the clubhouse appears to have been for club, and not charitable, purposes; tax exemption was denied.

The question of the use of the property, whether for one

or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., is a question of fact to be determined by the tax assessor from available evidence and proof of use. If the tax assessor is in doubt as to the use of the property, alleged to be for some religious, scientific, municipal, educational, literary or charitable use," such assessor may require that the owner of such property justify such alleged use by evidence and proofs laid before the said assessor.

Although as held above, it appears from the trust agreement that the purposes of the trust are eleemosynary and designed for religious, scientific, literary, educational and municipal purposes, it does not follow from that fact alone that its property is actually being held and used exclusively for one or more of such purposes. The right to exemption is to be determined largely as a question of fact in each particular case from available evidence and proofs obtained by the tax assessor, including that required of the taxpayer by the tax assessor.

The above stated question must be answered in each particular case by the application of the above rules and law to the facts in each particular case.

059-76—April 14, 1959

#### SCHOOLS AND SCHOOL CODE

#### SCHOOL BUSES—PRIVATE OR PAROCHIAL SCHOOLS— REGULATION OF TRAFFIC—§§234.04, AND 234.08, F. S.

To: Charles A. Nugent, Jr., County Solicitor, West Palm Beach

#### QUESTIONS:

1. Does a bus painted an orange color known as national school bus chrome and meeting other specifications for school buses as set forth in §234.08, F. S., but used solely and exclusively for the transportation of pupils to and from parochial or private schools come within the purview of §234.04, F. S.?

2. Is it a violation of §234.041, F. S., for a private institution or a public carrier to paint a bus with the color of national school bus chrome and mark and designate such bus as a school bus and then use said bus to transport pupils to and from parochial or private schools only?

Section 234.04, F. S., provides:

Any person using, operating or driving a motor vehicle upon or over the roads or highways of this state, upon approaching any school bus used in transporting school pupils to or from school, while such bus is stopped upon the roads or highways of the state, is required to bring such motor vehicle to a full stop before passing such school bus; . . .

Section 234.08, F. S., defines a school bus, within the meaning of the school code, as "a motor vehicle regularly used for the transportation of pupils of the *public schools* to and from school activities." (Emphasis supplied.)

Section 234.041, F. S., provides that it is unlawful for any person to use on the public highways of the state, any bus of the orange color known as national school bus chrome for the transportation of passengers other than a school bus.

In my opinion, it was the intention of the legislature to provide additional safety measures for the protection of school children while riding in school buses by designating the color of such buses so that they could be easily recognized by other motorists. Although it could be argued that *public school buses* have the exclusive right to use the color in question, I think that such construction would defeat the purpose of the act, which is primarily concerned with the safety of all school children.

I think, therefore, that any bus used *solely* for the transportation of children to and from school could be legally painted "national school bus chrome" and that it would be afforded the protection contemplated in §234.04.

I suggest, however, that since the legislature is now in session it would be constructive to amend the existing law in such a way as to remove any possible doubt as to the right of a private school to adopt the uniform color in painting its school buses.

Subject to the above observations, your questions are answered as follows:

Question 1 is answered in the affirmative.

Question 2 is answered in the negative.

059-78—April 16, 1959

#### EXECUTIONS

#### COMPENSATION OF SHERIFF WHERE SALE IS DISCONTINUED AT REQUEST OF PLAINTIFF—§30.23, F. S.

To: M. H. Bowman, Sheriff, Sumter County, Bushnell

#### QUESTION:

Where levy has been made upon property, it is advertised for sale and thereafter, while the sheriff is proceeding with the sale in accordance with law he is directed by plaintiff's attorney to discontinue the sale by reason of a settlement between the plaintiff and defendant, to what compensation is the sheriff entitled?

An execution placed in the hands of the sheriff is always under the control of the plaintiff and his wishes are to be respected. (See Florida Sheriffs' Manual, p. 168.) Consequently, the plaintiff, through his attorney, may properly suspend the holding of the sale. However, certain fees will have accrued to the sheriff. It is settled that fee statutes are to be strictly construed and "none allowed except where clearly provided by law" (Bradford v. Stoutamire, Fla., 38 So. 2d 685).

It is necessary to examine the provisions of §30.23, F. S., enumerating the fees and charges which may be made by a sheriff in connection with the performance of certain duties cast upon him by law. In this connection your attention is directed to that portion titled "Commissions on Money Collected Under Process Without Sale," providing for 2% on the first \$1,000; \$1,000 to \$3,000—1% and over \$3,000,  $\frac{1}{2}$  of 1%. It is clear that the statute intended that the sheriff should collect his commissions even though the sale is not completed, for immediately following the schedule of commissions there appears the following: "He shall after levy be entitled to collect said fees notwithstanding payment of debt to the plaintiff."

The other fees to which you would be entitled under the circumstances are \$2 for the levy, plus mileage; \$1.50 for dock-

eting and indexing the execution, plus \$ .25 for each plaintiff or defendant in excess of two; actual cost of advertisement of the sale, plus \$2 for "advertising property for sale under process" and the sum of \$ .25 for making the return on the execution.

It is my suggestion that your return show exactly what occurred; that is, that at the direction of the plaintiff's attorney during the progress of the sale the sale was discontinued by reason of a settlement reached between the plaintiff and the defendant. Since you are not advised as to the amount received by the plaintiff resulting from the execution upon which to base your commissions as money collected under process, I suggest if such is not ascertainable you calculate your commissions for the full amount stated in the execution.

Upon a proper showing that a smaller amount was collected by the plaintiff you may then adjust your commissions accordingly.

This answers your question as definitely as possible.

059-79—April 15, 1959

#### LABOR

PRIVATE EMPLOYMENT AGENCIES—PROCEEDINGS BEFORE INDUSTRIAL COMMISSION—WITNESSES, ADVANCE PAYMENT OF COMPENSATION—§§90.14, 90.15, 440.25 AND 449.13, F. S.; §24, ART. IV AND §4, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Do the provisions in §90.15, F. S., for advance payment of compensation to witnesses, have any application to revocation proceedings before the Florida industrial commission of private employment agency licenses under §449.13, F. S.?**

Said §90.15 in so far as here material provides that "compensation shall be paid to the witness by the party in whose behalf he is summoned....; but no person shall be compelled to attend court as a witness in any civil cause unless the party in whose behalf he is summoned shall first pay him the amount of compensation to which he would be entitled to for mileage and per diem for one day, or the same is deposited with the executive officer of said court, and he shall not be compelled to attend thereafter unless paid in advance...." This provision for advance payment of witnesses originated with §4, Ch. 4387, 1895. An examination of Ch. 90, F. S., reveals several references to courts and to civil and criminal cases. Only in §90.05 do we find any reference to an officer acting judicially, other than that of a court. The terms "court" and "civil cause" or case, as used in §90.15, and in other sections of Ch. 90, F. S., are not defined by the statutes.

Claim proceedings by the industrial commission, under the workmen's compensation statutes of this state, "do not constitute a judicial 'case' until brought to the" court for review. "As a judicial proceeding it is an original one in" the court to which it is brought for review (*Alcoma Citrus Coop. v. Isom*, 159 Fla. 10, 30 So. 2d 528; *St. Johns River Shipbuilding Co. v. Wells*, 156 Fla. 67, 22 So. 2d 632; *Orange Homes Co. v. Burnette*, 158 Fla. 625, 29 So. 2d 449.) Although essentially administrative in nature, the



authority conferred upon the industrial commission, by the workmen's compensation law is deemed quasi-judicial (*Frix v. Beck*, Fla., 104 So. 2d 81). There appears little, if any, legal difference between proceedings under §449.13, F. S., and the procedure in respect to claims under the workmen's compensation law. It, therefore, appears that a person appearing before the industrial commission, or one of its examiners, as a witness, whether under Ch. 440 or Ch. 449, F. S., in a claim hearing (§440.25) or a revocation hearing (§449.13), is not attending "court as a witness in any civil cause," within the intent and purview of §90.15, F. S.

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." (82 C. J. S. 554, §317; see also *U. S. v. Wittek*, 337 U. S. 346, text 359, 69 S. Ct. 1108, 93 L. ed. 1046, text 1414; 50 Am. Jur. 336-342, §§345 and 346; and 3 Sutherland Statutory Constr., 3rd ed. 183, §6301.) When these authorities are considered in the light of §24, Art. IV, and §4, Art. IX, State Const., it seems clear that §90.15, F. S., has no application of its own force to proceedings before the industrial commission under the workmen's compensation statutes for the determination of claims.

Section 449.13, F. S., after providing for the subpoenaing of witnesses to testify before the industrial commission in revocation hearings further provides that "such witnesses shall be entitled to the same per diem and mileage as witnesses appearing in the circuit courts of the state, which shall be paid by the commission." Section 90.14, F. S., fixes the compensation for witnesses in civil actions in the circuit courts and other courts. Witnesses subpoenaed to appear before the industrial commission and testify pursuant to §449.13 are not witnesses "compelled to attend court as a witness in a civil cause" within the purview of §90.15, F. S. Under §449.13 the industrial commission is empowered to issue witness subpoenas, which are subject to enforcement as therein provided.

We must, therefore, conclude that the provisions in §90.15 for advance payment of compensation to witnesses, is applicable only to persons compelled to "attend court as a witness in a civil case," and not to witnesses subpoenaed to appear before the industrial commission, in revocation hearings under said §449.13.

059-80—April 16, 1959

#### FLORIDA HIGHWAY CODE

HIGHWAYS AND ROADS—RELOCATION OF PUBLIC UTILITIES—REIMBURSEMENT—§§125.42, 338.17-338.21 AND 362.01, F. S.; §12, D. R., §23, ART. IV, §4, ART. IX, AND §29, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Where public utilities, under §§125.42, 338.17-338.21 or 362.01, F. S., have located their facilities upon the right-of-way of state, county or district highways or roads, other than interstate highways being constructed pursuant to the federal highway act of 1956,

may such utilities be reimbursed their costs for relocating their said facilities?

2. Is the same rule applicable to interstate highways constructed under and pursuant to the federal highway act of 1956?

3. Is the same rule applicable to public utility facilities located upon non-highway or road properties acquired by the state or a county or district for highway or road right-of-way purposes?

4. Where payment to public utilities for the relocation of their facilities are permitted, what is the duty of the state comptroller when auditing claims for reimbursement?

*Statutes permitting utility use of highways, etc.*—Section 125.42, F. S., authorizes the boards of county commissioners to license the use of county highways and road rights-of-way for facilities, posts, wires, etc. of public utilities; said section providing that "in the event of widening or repair or reconstruction of such road the licensee shall move or remove such water, sewage, gas, power, telephone or other utility line *at no cost to said counties.*" (Emphasis supplied.) Sections 338.17-338.21, F. S., make provision for the use of highways and roads by public utilities, specifically providing that "any utility heretofore or hereafter placed upon, under or over any public road that is found by the authorities to be unreasonably interfering in any way with the convenient, safe and continuous use and maintenance or necessary expansion of such public road shall, upon thirty days written notice to the person, or his chief agent, by the authority, be removed or relocated by such person at his own expense...." Then follows a proviso relating to interstate highways under the federal highway act of 1956, which proviso will hereinafter be considered. Section 362.01, F. S., grants to telephone and telegraph companies authority to place or erect their posts, wires and other fixtures for telephone and telegraph purposes upon public highways and roads. No mention is made in this section concerning removal or relocation of facilities made necessary because of the repair or relocation of the highway. Excluding interstate highways constructed or to be constructed under and pursuant to the federal highway act of 1956, none of the above mentioned statutes either provides for or requires the reimbursement of public utilities the expenses incurred by them in moving or removing their facilities occasioned by the repair or reconstruction of existing highways and roads.

*Common law or rule in absence of statute.*—The justices of the supreme judicial court of Maine, in their advisory opinion to the state senate, Maine, 132 A. 2d 440, text 443, states that "at common law there is no obligation to pay for the removal or relocation of public utility facilities required by changes in highways." In an advisory opinion by the justices of the supreme court of New Hampshire, N. H., 132 A. 2d 613, text 614, it is stated that "utilities are required to relocate their facilities at their own expense whenever public health, safety or convenience require change to be made," citing, among other authority, 12 McQuillin, Municipal Corporations, 3rd Ed., §§34.74 and 34.77, and quoting therefrom, that "there '... has been no dissent from the common law rule as enunciated by numerous courts that, in the absence of a clear

statutory mandate shifting the burden to the state, utilities are obligated to relocate at their own expense their facilities located in public highways when required to facilitate highway improvements.' The supreme court of California, in *Southern California Gas Co. v. Los Angeles, Cal.*, 329 P. 2d 289, text 290, after citing authorities from many state courts, states that "in the absence of provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets." This same rule has been adopted by the supreme court of Florida, in *Southern Bell Tel. and Tel. Co. v. State, Fla.*, 75 So. 2d 796, text 800-802. The use of the highways and roads of this state by the traveling public is the primary use of the same, the use by public utilities is only a secondary use (*Peninsular Tel. Co. v. Marks*, 144 Fla. 652, 198 So. 330, text 332.)

Highways and roads were built first and when the public utility "installed its facilities in the streets (highways and roads) it did so knowing that if it became necessary in the future to improve such streets in the interest of general welfare, its facilities would have to be moved, relocated or rearranged. In other words, it knew then that its facilities and business were then and always would be subservient to the rights of the public." (*Southern Bell Tel. and Tel. Co. v. State, Fla.*, 75 So. 2d 796, text 799). From the opinion in the last mentioned case, as well as other authorities cited and referred to, in the absence of statute, under the law of this state the cost of moving and relocating public utility facilities, in connection with the relocation, widening, double laning, etc., of public highways and roads in this state, where such utilities are using a highway or road right-of-way, under or pursuant to §§125.42, 338.17-338.21 or 362.01, F. S., are obligations of such utilities.

Under law as above announced, in the absence of a statute providing otherwise, public utilities locating their facilities over, on or under public highways and roads in this state, are required to bear the costs and expenses of removing or relocating their such facilities when, because of the relocation, widening, double laning, etc., of such public highways or roads, such relocation or removal of such utilities becomes necessary. Utilities using highways or road rights-of-way for their facilities, under said §§125.42, 338.17-338.21 or 362.01, F. S., exercise such rights as or in the nature of licensees or tenants at sufferance.

*Statutory provision for reimbursement required.*—Having concluded that reimbursement of such public utilities is dependent upon a statute providing therefor, a search of the statutes and general laws of this state reveals only one provision that may be construed as such a statute; that is, the proviso in §338.19(1), F. S., which, in so far as here material, provides as follows:

Provided, however, that if the relocation of utility facilities, as referred to in section 111 of the federal aid highway act of 1956, public law 627, of the eighty-fourth congress, is necessitated by the construction of a project on the federal aid interstate system, including extensions thereof within urban areas, and the cost of such relocation is eligible for reimbursement under said law, then and in that event the utility owning or operating such facilities

shall relocate same upon order of the state road department, and the state shall pay the entire expense properly attributable to such project after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility. (Emphasis supplied.)

In short, the cost and expense of the removal or relocation of public utility facilities "on the federal aid interstate system" may be reimbursed by the state when "*the cost of such relocation is eligible for reimbursement . . .*," under "section 111 of the federal highway act of 1956, public law 627 . . ." (Emphasis supplied.) Before there may be any reimbursement for the removal or relocation of public utility facilities the same must be (1) on the federal aid interstate system, and (2) before such reimbursement may be made from state funds "the cost of such relocation must be "eligible for reimbursement under" the federal highway act of 1956, and (3) in determining the amount of the reimbursement there shall be deducted from the cost of relocation "any increase in value of the new facility and any salvage value (which may be) derived from the old facility." These three requirements appear from the Florida statute to be mandatory requirements to be met before reimbursement may be made. This proviso appears to be specifically limited to the state interstate highway system, and has no application to the federal aid primary and secondary systems, the state road system, or to county and district road systems.

*Construction of the proviso.*—Provisions for reimbursement of utility removal and relocation on such interstate systems in this state is provided by a proviso in §338.19, F. S. This brings us to the construction of the proviso. "The office of a proviso in a statute is not to enlarge or extend the act of which the section is a part but rather to be a limitation or a restraint upon the language which the legislature has employed. A proviso is to be construed *strictly* and limited to objects fairly within its terms, or to qualify or restrain it generally" (Farrey v. Bettendorf, Fla., 96 So. 2d 889, text 893). "The office of a proviso is to restrict the enacting clause; to except something which would otherwise be within it, or in some manner to modify it; and where it follows and restricts an enacting clause, general in scope and language, *it is to be construed strictly*, and limited to objects fairly within its terms." (Futch v. Adams, 47 Fla. 257, 36 So. 575, text 577). The proviso in §338.19 must, therefore, be strictly construed and limited to objects fairly within its terms. The said proviso may not, therefore, be extended to anything other than federal aid interstate highways under the federal highway act of 1956. Under said federal act federal funds may not be apportioned to states in reimbursement "when the payment to the utility violates the law of the state" of Florida. For the state to reimburse a public utility for the removal or relocation of its facilities on an interstate highway forming a part of the federal interstate system, such payment must be one "eligible for reimbursement under" the federal highway act of 1956, if not eligible payment may not be made from the state treasury.

*Acquiring right-of-way upon which may be located a public utility facility.*—The foregoing portion of this opinion has considered the question of reimbursement for the removal or the relocation of utility facilities from or on public highway and road



rights-of-way in this state. We have not considered disposal of utility facilities on property acquired by the state, county or district for right-of-way purposes. There is a clear distinction between public utility facilities located upon a highway or road under and pursuant to §§125.42, 338.17-338.21 or 362.01, F. S., and like facilities on property owned by or under lease to a public utility as a part of its separate right-of-way for its facilities. Such private right-of-way of the public utility would constitute property of the utility. This relation must be distinguished from that of a utility occupying a part of a highway or road right-of-way under §§125.42, 338.17-338.21 or 362.01, F. S., which is in the nature of a tenant or licensee at sufferance. One is property within the purview of §12, Declaration of Rights, or §29, Art. XVI, State Const.; the other is merely a license or right, but not property. Where the public utility owns real property, either in fee or a leasehold, upon which it has utility facilities, before the same may be taken and used by the state, or a county or district, the same must be acquired by purchase or eminent domain, or otherwise. It is, therefore, evident that the rule applicable to utilities using rights-of-way of state, county or district roads or highways, other than federal interstate system highways, under §§125.42, 338.17-338.21, F. S., as to the removal or relocation of utility facilities is not applicable to real property held by the public utility either in fee or leasehold, or other right of possession in the nature of a property, or property right.

*Duty of the state comptroller as pre-auditor.*—Under §23, Art. IV, State Const., the state comptroller is required to examine, audit, adjust and settle all accounts of the state before payment and pay the same pursuant to "appropriations made by law" (§4, Art. IX, State Const.). There being no authority for the reimbursement by the state for utility relocation costs, other than such costs incurred in the relocation or removal of utility facilities on or from the rights-of-way of federal interstate highways being constructed or reconstructed pursuant to §111 of the federal highway act of 1954, the state comptroller is interested only with such costs in connection with such interstate highways. Relocation costs on other roads and highways in this state may not be reimbursed. The purchase or taking by eminent domain of utility rights and property, not previously on highway or road rights-of-way being taken over by an interstate highway system, are not reimbursements but a purchase of the property or property right to be used. Such expenses are right-of-way expenses, not relocation costs within the purview of the proviso in said §338.19, F. S. The two are separate and distinct.

*Conclusions.*—From the above statutes, authorities and observations we conclude that:

1. The expenses of removal or relocation of public utility facilities located upon state, county and district highways and roads, other than interstate highways being constructed under the federal highway act of 1956, may not be reimbursed from state funds. This answers question 1 in the negative.

2. Question 2 is answered in the negative. Here reimbursement must be for the removal or relocation of public utility facilities on federal interstate highways (not federal aid primary or secondary roads or highways);

and then only in such cases where such reimbursement is eligible for reimbursement under §111 of the federal highway act of 1956. Only when there has been deducted from the cost of removal or relocation the "increase in value of the new facility (over the old) and any salvage value derived (may or should be derived) from the old facility," may the same be paid.

3. Question 3 is answered in the negative. The cost and expense of acquiring a right-of-way for any road or highway for public use, will include any utility facility, or its removal or relocation, when not a part of, or located on, an existing public highway or road right-of-way.

4. The duties of the state comptroller, when auditing accounts and claims for reimbursement for removal or relocation costs and expenses of utility facilities on the interstate highway system, differ little, if any, in detail from ordinary accounts and claims. The above paragraph on the duty of the state comptroller as pre-auditor should be noted.

This opinion is designed to cover the questions generally. Specific problems will receive specific consideration upon presentation.

059-81—April 16, 1959

#### PORTS AND HARBORS

#### REPORTS BY MEMBERS OF BOARD OF PILOT COMMISSIONERS TO THE STATE COMPTROLLER REQUIRED—

§§116.03, 310.01, 310.26 AND 310.27, F. S.

To: *J. Rex Farrior, Jr., Secretary, Board of Pilot Commissioners Hillsborough County, Tampa*

#### QUESTION:

**Are the members of the board of pilot commissioners of Hillsborough county required to file the report with the state comptroller as provided in §116.03, F. S.?**

Section 310.01, F. S., provides, among other things, for the appointment by the governor of a board of pilot commissioners for each county in the state in which a port is located; said board to consist of five members.

Section 310.26, F. S., provides for the compensation of the board of pilot commissioners, which shall be 1% of the gross amount of pilotage earned by said pilot during each year.

Section 310.27, F. S., provides for the board of pilot commissioners to keep a full and accurate account of all receipts and expenditures and transmit to the comptroller a true and correct copy of same annually; the same to be filed on the first Monday in January of each year. Said section further provides that each commissioner shall append to such report an affidavit that he has not taken or received any moneys or goods as presents directly or indirectly for services as commissioner, except the legal fees.

Section 116.03, F. S., provides, among other things, that each state and county officer who receives all or any part of his compensation in fees or commissions, or other remuneration, shall make a report to the comptroller annually on December 31; said report to be made on a form prescribed by the comptroller.

In view of the foregoing, it is my opinion that the members of the board of pilot commissioners of Hillsborough county are

county officers within the contemplation of §116.03, F. S., and should file the report prescribed therein. Your question is answered in the affirmative.

059-82—April 17, 1959

**REGULATION OF TRADE AND COMMERCE**  
**LICENSING OF CEMETERY LOT SALESMEN BY FLORIDA**  
**REAL ESTATE COMMISSION—§§475.01 (2), (11), F. S.**

To: *George L. Hollahan, Jr., State Representative, South Miami*

**QUESTION:**

**Is a cemetery lot salesman required to be licensed by the Florida real estate commission particularly when no title to the land is conveyed?**

Section 475.01(2), F. S., defines "real estate salesman" and "real estate broker." Section 475.01(11), F. S., defines "real estate" as follows:

The term "real estate" or "real property" used in subsection (2), shall include leaseholds, assignments of leaseholds and subleaseholds thereof, as well as *any and every interest* or estate in land. (Emphasis supplied.)

In view of the foregoing statute, your question is answered in the affirmative.

Incidentally, this matter was discussed with the attorney for the Florida real estate commission and he advised that the commission, as a matter of departmental construction, has also interpreted the sections of the Florida Statutes which define a "real estate salesman" and "real estate broker," coupled with the definition of "real estate," to mean that such a salesman as you describe would be required to be licensed by the commission.

059-83—April 27, 1959

**TAXATION**

**PREMIUM RECEIPTS TAX—CH. 645 AND §645.09(1), (2), F. S.**

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

**QUESTION:**

**Does §645.09(2), F. S., exempt from the premium receipts tax, the premiums on all forms of insurance for those industries having to do with aviation or shipping?**

You state that two insurance contracts have been submitted to your office on which no premium receipts tax has been paid. One contract covers "ship repairer's liability" and the other covers terminal operator's liability of the Port Everglades terminal Co., Inc.

Section 645.09(2), F. S., provides:

The premium receipts tax requirements of subsection (1) of this section shall not apply with respect to premiums collected for ocean marine or aviation insurance placed by a licensee in pursuance of this chapter.

Ocean marine insurance is defined in Couch on Insurance 2d, Vol. 1, p. 88, as follows:

Marine insurance is a contract by which, for a consideration to be paid by one interested in a ship, freight, or cargo subject to marine risks by certain perils of the

sea or specified casualties during a voyage or a fixed period, another undertakes to indemnify him for loss or damage to such interest; and, while it may be general or specific, it usually includes risks of river and inland navigation, and of railway and other land carriage connected with sea transit.

Ocean marine insurance is defined in Richards on Insurance, Vol. 1, p. 64, as follows:

Marine insurance is insurance against risks connected with navigation to which a ship, cargo, freight, profits, or other subject of an insurable interest may be exposed during a certain voyage or for a fixed period of time.

It is my opinion that the two types of coverage described in your letter are not policies of ocean marine insurance within the contemplation of §645.09(2), F. S. The clear reason for exempting ocean marine and aviation insurance from the premium receipts tax is that to impose such a tax would be futile due to the mobility of the subject of the insurance and due to the location of the risk. If this state should impose a premium receipts tax, such insurance would merely be written in another jurisdiction. The policies in question, however, are merely liability policies involving risks located entirely within this state. The risks covered by these policies are not risks of the ocean transportation of goods. There is no reason to suppose that the legislature intended to exempt insurance involving risks located exclusively in this state simply because the risk was associated with aviation or shipping. Accordingly your question is answered in the negative.

059-84—April 27, 1959

#### PUBLIC OFFICIALS

#### LEAVES OF ABSENCE TO PUBLIC OFFICIALS FOR MILITARY SERVICE—§§115.09 AND 250.02, F. S.

To: *Angus Laird, Director, Florida Merit System, Tallahassee*

#### QUESTION:

**Is §115.09, F. S., applicable to state and county officers and employees who volunteer for military service under the new federal program whereby young men may volunteer for the six months training service and upon discharge or release become members of the armed services reserve or national guard?**

Section 115.09, F. S., provides, in so far as here material, that "all state and county officials in the state, and all others who hold office under the government of the state, and who are officers or enlisted men in either the Florida defense force, the national guard, the naval militia, marine corps, *unorganized militia*, United States army reserve, United States naval reserve, United States Marine corps reserve, United States Coast guard reserve, or officers or enlisted men in any other class of the militia, or county school officers, and all municipal officials in the state, *may*, subject to the provisions and conditions hereinafter set forth, be granted leave of absence from their respective offices and duties to perform active military service, the first thirty days of any leave of absence to be with full pay and the remainder without



pay." (Emphasis supplied.) The above classifications seem clear and definite, with the possible exception of the term *unorganized militia*, which may need specific consideration. Section 1, Art. XIV, State Const., provides that "all able bodied male inhabitants of the state between the ages of eighteen and forty-five years, that are citizens of the United States, or have declared their intention of becoming citizens thereof, shall constitute the militia of the state. . . ."

Under §250.02, F. S., the organized militia is composed of "the national guard and such other organized military forces as are now or may be authorized by law," and the *unorganized militia* of "all male persons subject to military duty but who are not members of the units of the organized militia." The military organizations under Chs. 5202 and 8502, 1903 and 1921, contained a like or similar classification of the Florida militia. This brings us to a construction of the phrase, "to perform active military service," as contemplated by said §115.09, F. S. The term "active military service" is defined by §115.08, F. S., as signifying "active duty in the Florida defense force, or federal service in training or on active duty with any branch of the army of the United States, the United States navy, the marine corps of the United States, the coast guard of the United States, and service of all officers of the United States public health service detailed by proper authority for duty either with the army or the navy. . . ." Nowhere in this definition is there any mention made of the armed services reserves, which are expressly mentioned in §115.09. The reference in the definition above quoted from appears to relate to active services and fails to mention the reserve services. This brings us to the status and nature of the "new federal program whereby young men may volunteer for the six months training service," mentioned in the above question.

In our letter to you under date of Feb. 19, 1958, you were advised that "a state employee who is ordered to active duty for training for a period of six months would be eligible for the thirty days pay in accordance with the provision of section 115.09, Florida Statutes." It is clear that the six months period of training considered in said letter was the above mentioned new federal program whereby young men may volunteer for the six months training service. We here readopt the holding in said letter and answer the above question in the affirmative.

059-85—April 27, 1959

#### DOMESTIC RELATIONS

HUSBAND AND WIFE—ISSUANCE OF MARRIAGE LICENSES  
—CONSTRUCTION OF §§741.04 AND 741.06, F. S.

To: John T. Rose, Jr., County Judge, Punta Gorda

#### QUESTION:

May a county judge issue a marriage license to a 20-year old male and a 19-year old female based on their acknowledgment under oath that they are the expectant parents of a child?

Section 741.04, F. S., contains a general prohibition against a county judge issuing a marriage license to parties under the age of 21 years unless the written consent of the parents or guardian acknowledged under oath be given, except where both

parents of such minors are deceased or where the disability of the minor has been removed by a prior marriage.

Section 741.06, F. S., prohibits the issuing of a marriage license to a male under the age of 18 or to a female under the age of 16, with or without parental consent, "*unless the applicants acknowledge under oath that they are the parents or expectant parents of a child, and in that event the license may be issued at the discretion of the judge.*" (Emphasis supplied.)

The above italicized portion of §741.06 clearly authorizes the county judge to exercise his discretion in issuing a marriage license to minors under the ages set out in this section. Hence, the answer to your inquiry turns on the construction of §§741.04 and 741.06.

In statutory construction, courts must be guided by legislative intent notwithstanding it may appear to contradict the strict letter of the statute, and no literal interpretation should be given that leads to an unreasonable conclusion or purpose not designated by the legislature (*Statè ex rel Hughes v. Wentworth*, 185 So. 357, 135 Fla. 565). And, the primary purpose designated in a statute should determine the force and effect of the words used in the statute, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers (*Smith v. Ryan*, 39 So. 2d 281).

Policy as well as the letter of the law is a guide to decision, and resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes (*Cox v. Roth*, 75 S. Ct. 242, 348 U. S. 207, 99 L. Ed. 260). If the courts can by any fair, strict or liberal construction find for the two statutes a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation, it is their duty to do so (*City of St. Petersburg v. Pinellas County Power Co.*, 100 So. 509, 87 Fla. 513).

These sections, when considered in the light of the above authorities, lead but to the conclusion that the legislature intended to create an exception to the prohibition against the issuance of marriage licenses to minors where said minors were the parents or expectant parents of a child. They appear to have authorized the issuing county judge to exercise his sound discretion in licensing such persons to marry. Any other construction placed on these sections would result in the absurdity, and perhaps an unconstitutional denial of equal protection of the laws, in that minors below the ages set forth in §741.06 who were parents or expectant parents could be licensed to marry; while minors under the same circumstances below the age of 21 years, but over the ages defined in the statute, could not be so licensed.

Such construction most certainly conflicts with the strong public policy of this state favoring the legitimacy of children.

In the exercise of his discretion as to whether a marriage license should be issued to minor applicants under the circumstances as outlined by your inquiry, I believe the county judge would have a right to require proof of the physical condition of the female applicant if he has reason to doubt the truth of the statement of that party's pregnancy.

This question was considered by my predecessor in office in A. G. O. 048-74, 1947-48 biennial report of the attorney general,

p. 581. Inasmuch as that opinion is contrary to the views herein expressed, it is hereby completely overruled.

059-86—April 29, 1959

### TAXATION

#### TAXATION OF PROPERTIES APPEARING ON SUBDIVISION MAP OR PLAT, WHERE THERE HAS BEEN NO FORMAL DEDICATION

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Where a subdivision of lands by their owner shows on the map or plat thereof certain ways, including canals or waterways, but there has been no formal dedication of said ways for public use, should the same be assessed for ad valorem taxes?**

We gather from your file handed us with the said request for opinion that a subdivision is involved in the question where the subdivider has laid out on the subdivision plat or map certain ways, including streets and artificial canals, which have not been accepted and dedicated to public use. We gather from the request for opinion that there has been no formal dedication of the ways by the owner or acceptance by the public. These facts seem to present two questions: (1) the right of the public in and to the use of such lands and waterways, and (2) the rights of the owners of the lots in the subdivision sold by the developer.

A common law dedication is a setting apart of land for public use (*Miami v. Florida East Coast R. R. Co.*, 79 Fla. 539, 84 So. 726, text 729; *Miami Beach v. Miami Beach Improvement Co.*, 153 Fla. 107, 14 So. 2d 172, text 175). "It is necessary to show, so as to constitute dedication at common law, that there is an intent on the part of the proprietor of the land to dedicate the same to public use; there must be an acceptance by the public, and the proof of these facts must be clear, satisfactory and unequivocal" (*Miami Beach v. Miami Beach Improvement Co.*, *supra*). "In order to constitute a dedication there must be (1) an intention, on the part of the proprietor of the land, to dedicate the property to public use, and (2) an acceptance by the public." (10 Fla. Jur. 3, §1). "Strictly speaking, there can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public." (*Burnham v. Davis Islands, Inc.*, Fla., 87 So. 2d 97, text 100).

Although the filing of a subdivision plat may or may not amount to an offer to dedicate the streets and canals indicated thereon to the use of the public and the purchasers of lots in the subdivision; however, the distinction between the rights of the public and those of the purchasers of lots in the subdivision becomes material. "Such purchasers' rights depend, not upon a true dedication, but upon a private easement implied from sales with reference to a plat showing streets, parks, or other areas subject to their use and enjoyment. . . . Such easements are vested or perfected in a grantee immediately upon conveyance to him, but it is clear that his rights are determined on the basis of principles of law applicable to private property interests as

opposed to public dedication." (*Burnham v. Davis Islands, Inc.*, Fla., 87 So. 2d 97, text 100).

To dedicate lands for public use there must be an intention of the proprietor to dedicate the land to public use and an acceptance of that offer by the public (*Hamilton v. Laesch*, 134 Fla. 591, 184 So. 110, text 111; *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425, text 427; *Roe v. Kendrick*, 146 Fla. 119, 200 So. 394, text 395; *Board of County Commissioners v. F. A. Sebring Realty Co.*, Fla., 63 So. 2d 256, text 258). The approval of a subdivision map or plat, under Ch. 177, F. S., "is merely a prerequisite to the presentation of a map or plat to the County Clerk for the purpose of recording it. . . . The approval of a map or plat containing an offer to dedicate as a prerequisite to its recordation should not be declared the equivalent of a formal acceptance of the offer to dedicate when the statute fails to declare such approval to be a formal acceptance of an offer to dedicate and such intent is not ascertainable by necessary implication." (*Board of County Commissioners v. F. A. Sebring Realty Co.*, supra). The question would seem to arise in connection with the taxation of roads, streets, canals and other ways of whether or not there has been an offer to dedicate the same to the public, and if so, has the same been accepted by the public.

In *Smith v. Horn*, 70 Fla. 484, 70 So. 435, text 436, cited with approval in *Servando Building Co. v. Zimmerman*, Fla. 91 So. 2d 289, text 291, it was stated that the rule for construction of subdivision maps and plats, and conveyances describing the lands conveyed by reference to such maps and plats, are those "for construing conveyances, and must be applied to carry out, and not to frustrate, the intention of the parties. Where no contrary intent appears, a conveyance to a street carries title to the center of the street, subject to the public easement, the title to the land under the street passing by construction, and not as appurtenant to the abutting land." In those cases where title passes to the center of the street, as well as to the center of the canal, no problem seems to be presented as the land under the streets and canals belongs to the owner, although burdened by the street or canal easement.

Only in those cases where title to the center of the road did not pass to the purchaser, but stops at the edge of the road, do we have any problem. Where the title to the street or canal is vested in the state, county or municipality (the public) it is public property and not subject to taxation; this likewise presents no problem. This brings us to the status of private ownership of streets and canals, including those subject to public or private street, road and highway use. In those cases where the title to the street or canal right-of-way, although used under a perpetual easement or use, remains vested in the subdivider, or his heirs or grantees the remainder would be of little if any value so long as the street or road is being used for general public use. It is doubted that the remainder under these circumstances would be of sufficient value to justify taxation; however, that would be a question of fact for the tax assessor to determine.

We come next to those streets and canals not dedicated to or generally used by the public, but over which the purchasers in the subdivision have acquired private easements implied from



sales with reference to the subdivision plat (*Burnham v. Davis Islands, Inc.*, supra). These private easements grant to the subdivision purchasers the right and privilege of using the said streets and canals, although a corresponding right is not granted to or accorded the general public. It is doubted that such streets and canals are to be deemed public streets or canals so as to exempt them from taxation. Unless they may be said to be owned and used for some religious, scientific, municipal, educational, literary or charitable purpose, they would not be entitled to tax exemption.

The above posed question is not subject to a definite and fixed positive or negative answer; the answer must be determined from the factual situation in each particular case measured by the rules above set out and discussed.

059-87—April 29, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
SALE OF SECURITIES—STOCK OR MEMBERSHIP CERTIFICATES IN COOPERATIVE ASSOCIATIONS AS CONSTITUTING SECURITIES—CHS. 517, 608 AND 611 AND §§517.02(3), 517.05, 517.06, 608.13(12), F. S.**

To: *D. H. Mays, Director, Florida Securities Commission, Tallahassee*

**QUESTION:**

**Do stock certificates and/or membership certificates of a cooperative association organized as a corporation for profit as provided in §608.13(12) F. S., constitute securities within the provisions of Ch. 517, F. S.?**

As disclosed by the enclosed letter from Mr. Dawes, the stated purpose of this cooperative association is to enable various retailers operating toy or variety stores to combine their operations, thus enabling them to purchase more economically merchandise which is to be sold by them. Thirteen retailers have subscribed to the articles of incorporation.

Once a charter is granted, it is proposed to bring into the organization additional variety or toy store operators, possibly as many as 190, who will each pay \$1,000 for a stock certificate and/or membership certificate. Each member will be required to invest a like amount for each store operated by him. This amount may be used to pay obligations or defaults of individual members. Each member will also be required to pay for any merchandise purchased by him in an amount equal to the actual cost of the merchandise to the corporation, plus 10%. In addition, there will be a \$10 monthly assessment for servicing the various members; said assessment will also cover the expenses for manager, help, and rental obligations for a warehouse which they propose to rent. The proceeds, if any, which may be accumulated by the corporation during the year, or for any given period that may be established by the corporation, will be refunded periodically to the members in a formula keyed to the amount of merchandise purchased during the period in question.

Under §517.02, F. S., "stock" is by definition a "security." Under subsection (3) of said statute, the following definition is found: "'Sale' or 'sell' shall include every disposition or attempt to dispose, of a security or interest in a security for value . . ." It seems clear that the contemplated offer and sale of stock by

the corporation in question would be subject to the registration requirements of Ch. 517, F. S.

The file before me does not contain any facts which would indicate the availability of an exemption under §§517.05 and 517.06, F. S., (See in this connection A. G. O. 049-258, dated June 15, 1949, 1949-1950 biennial report, at p. 476, which held that cooperative associations organized under Ch. 611, F. S., (now repealed) were required to register their stock and other securities under Ch. 517, F. S., prior to offering the same for sale in this state.)

Assuming, however, that the corporation, instead of issuing stock, issues only the membership certificates, such membership certificates would nonetheless constitute securities under §517.02, F. S. The definition therein of "security" includes "... investment contract or beneficial interest in title to property, profits or earnings; interest in or under a profit-sharing or participation agreement or scheme or any other instrument commonly known as a security . . ."

It matters not in substance whether the retailer who pays in his \$1,000 receives for it a stock certificate or a membership certificate. His money is used for the same purpose and his right to share in the profits of the corporation remains unaffected.

Various types of membership plans have been held to involve the issuance of securities. Several cases in which these plans were construed are cited in Loss Securities Regulation. Among the cases there cited are *S. E. C. v. Univ. Serv. Ass'n*, 106 Fed. 2d 232, (C. A. 7th Cir.) Cert. denied 308 US 622 and *US v. Montjar*, 47 Fed. Supp. 421, 427.

Understandably, because of the broadness of the scope of the definition of a security as contemplated by the various blue sky laws, a large number of opinions have been written in the area in point by the various attorneys general throughout the states.

A membership certificate in a cooperative burial association was held to be a security where the articles of incorporation provided that the net income of the association was to be distributed among the certificate holders and also provided for voting privileges. Minnesota attorney general's opinion, Dec. 18, 1931, as cited in *C. C. H. Blue Sky Law Reporter*, §1655. In a Texas attorney general's opinion, dated Sept. 24, 1945, memberships in a cooperative hospital which was not organized purely for charitable purposes were deemed to be securities, *C. C. H. Blue Sky Law Reporter*, §1655.

A certificate of membership in a nonprofit cooperative association or syndicate, which membership represents a right in the holder thereof to share in the surplus profits of the business conducted, was classed as a security (*C. C. H. Blue Sky Law Reporter*, §1655; Calif. attorney general's opinion, Nov. 1, 1930; Minn. attorney general's opinion, Jan. 23, 1933; Ore. attorney general's opinion, Dec. 12, 1932; Ore. attorney general's opinion, July 13, 1934).

In the Ohio case of *Groby v. State*, 109 Ohio 543, 143 NE 126, a membership receipt was held to clearly fall within the express provision of the security statute. The instrument which purported to be a receipt for an amount subscribed for a membership interest in an organization, called the "citizens' syndicate" by its terms, entitled the subscriber "to all pro-rata interest in all earnings and profits of the said syndicate which the amount of this receipt bears to the total capital of the syndicate as per the terms and conditions

of said subscription." The court held that it was clear that if the citizens' syndicate had or should have any property from which there would be any profits or earnings of any sort, then the instrument in question was an evidence of title or interest in the property.

Agreements that represent interests whereby funds are invested in an enterprise with the understanding that profits earned through the operation of the enterprise will be divided with the investors, have usually been held to be securities under the various state security laws (C. C. H. Blue Sky Law Reporter, §1611). (See also the Annotation at 163 A. L. R. 1051.) The fact that a document lacks the degree of definition and certainty necessary to make it a contract does not prevent its being an agreement prohibited by the securities law, providing that the term "security" shall include "interest in or under a profit-sharing or participating agreement or scheme." (State v. Code, 178 Minn. 492, 227 NW 652).

An investment contract means a contract or scheme for the placing of capital or laying out of money in a way intended to secure income or profit from its employment (State v. Gopher Tire and Rubber Co., 146 Minn. 52, 56, 177 NW 937, 938). This definition has been uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise, with the expectation that they would earn a profit solely through the efforts of the promoter or someone other than themselves (S. E. C. v. W. J. Howey Co., 328 US 293, 66 Sp. Ct. 1100, 90 L. Ed. 1244).

In the instant case each member pays \$1,000 for his membership certificate. The corporation is thereby furnished capital with which to operate without the necessity of issuing stock, and the certificate holder becomes entitled to a share of the profits or earnings of the corporation. Profits are distributed to the certificate holders in proportion to the amount of merchandise purchased by the members. Each investor in the enterprise, it must be assumed, invests his money with the hope or expectation of realizing a profit from its operation. This profit is not derived from efforts of the investor, but from the use of his money by others who manage and operate the enterprise.

In light of the foregoing, it seems that the stock and/or membership certificates in question constitute a security and are, therefore, within the purview of Ch. 517, F. S. Your question is, therefore, answered in the affirmative.

059-88—April 30, 1959

### TAXATION

TAX ASSESSORS' COMMISSIONS—PAYMENT PURSUANT TO §193.67, F. S.—§§192.04, 192.21, 193.12, 193.25 AND 193.65, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where a county assessor of taxes in this state fails to requisition payment of any month's advance of compensation under §193.67, F. S., until after Jan. 1 of the following year, may he subsequently, but prior to final settlement with the board of county commissioners as

**provided in said section, requisition for such advance payment or payments?**

We are informed that one of the tax assessors failed to requisition for several of the monthly advances payable to him for 1958, under §193.67, F. S., until after Jan. 1 of the following year. Said §193.67 provides as follows:

*County commissioners to pay assessor monthly.*— The boards of county commissioners of the several counties of Florida shall pay, or cause to be paid, to the county assessors of taxes of each such county, respectively, in the state, monthly, on the first day of each and every month, on demand of such county assessor of taxes, respectively, an amount or sum equal to one-twelfth of four-fifths of the total amount of commissions received by such county assessor of taxes, or his predecessor in office, from such county, during and for the preceding year, and the balance of the commissions earned by such county assessor of taxes, respectively, during each year, over and above the amount of such installment payments herein provided for, shall be payable when a report of errors and double assessments is approved, by the county commissioners of the several counties respectively, and a copy thereof filed with the comptroller of the state.

Although all property subject to ad valorem taxation in this state is assessable as of Jan. 1 of the tax year (§192.04) tax returns may be made any time prior to April 1 of the tax year (§193.12), tax valuations are not final until after equalization (§193.25). Tax rates are not fixed and determined until after the valuations have been finally determined and fixed. It is, therefore, readily evident that the commissions payable to the tax assessor for assessing taxes for any year may not be determined, under §193.65, F. S., until after the tax rolls for the current tax year is made up and the millages extended. This being true, the assessor's compensation may not be determined until more than six months of the tax year have elapsed and much of the work required in preparing the tax roll is completed. These observations point up the necessity for the plan of payment embraced in said §193.67, F. S., under which the tax assessor receives advance payments upon his office compensation to be determined after the rolls have been completed for the tax year.

Under §192.21, F. S., most taxing laws and statutes of this state are to be construed as directory and not mandatory. We are, therefore, of the opinion that the provision in §193.67, F. S., should be construed as directory only and not mandatory, and that the unpaid monthly advances under §193.67, F. S., may be requisitioned for and paid to the tax assessor at any time prior to the final settlement provided for in and by said section. Under said §193.67 final settlement is due "when the report of errors and double assessments is approved by the county commissioners."

The above question is, therefore, answered in the affirmative provided the unpaid advance payments are requisitioned for prior to or at the approval of the report of errors and double assessments by the board of county commissioners.



059-89—April 30, 1959

### TAXATION

#### DOCUMENTARY STAMP TAXES—CREDIT PLANS, CREDIT ACCOUNTS AND SIMILAR AGREEMENTS—§201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Are the so-called credit plans or credit accounts and similar bank financing agreements, between banks and their customers, subject to documentary stamp taxes under Ch. 201, F. S.?**

An examination of your file handed us with the said request for opinion reveals that three or more plans are used in connection with the above stated question. *Under the first of these plans*, referred to in its agreement as the "Florida-check Credit Plan," the bank and its customers agree that "each check as it is drawn and presented to the bank and charged against my (the customer) loan account, whether presented by the undersigned personally or by way of endorsers, shall constitute an irrevocable acknowledgment of the receipt of funds, and said check shall constitute evidence of payment to or for the benefit of the undersigned. The original checks may be retained by the bank until final payment and discharge of the loan account. *These checks or the aggregate of the same, shall constitute an irrevocable obligation to pay* the bank all sums due and represented by said checks, together with interest and charges, said interest to be computed at the rate of . . . computed on daily balances. . . ." Under the above italicized provision of the financing agreement, the checks or the aggregate of them, when read in the light of the said financing agreement, constitute a written obligation to pay money, within the purview of §201.08, F. S. In accordance with the financing agreements payments are to be made "within seven days after statement mailing date." Although the financing agreement may be said to be a written obligation to pay money the amount payable may not be determined until after the issuance of the checks. The checks themselves constitute an obligation to pay money only when read in connection with the financing agreement, which amount is to be periodically fixed by statements set out by the bank.

*Under the second of these plans*, referred to in its agreement as the "Pan-A-Bank Redi-Credit Account," it is provided in part that the bank "will make loans to me (the customer) which will not increase the balance in my . . . account at any time outstanding above. . . . Payment by you (the bank) of any check properly drawn hereunder on the check forms supplied *shall constitute a loan to me* of the amount so paid. . . ." The signed agreement, between the customer and the bank, further provides *that the customer promises to pay the bank* "all the principal sums borrowed hereunder" with interest at the rate stated in the said agreement. The customer, by the said agreement, further obligates himself to pay "on account regular consecutive monthly installments equal to one-twentieth of the maximum credit or such lesser amounts" as may be necessary to reduce the said account. Here, like under the first above plan, the financing agreement and the checks together constitute the complete agreement between the parties. Although the agreement fixes a maximum amount for the account between the bank and its customer there is no written promise to pay such an amount; the

amount to be paid is the amount of the checks drawn. The obligation is that the customer promises to pay to the bank "all principal sums borrowed hereunder," which may not be determined in advance, through "regular consecutive monthly installments. . . ." There seems to be little, if any, legal difference between the first and second plans above mentioned and discussed.

*Under the third of these plans*, the bank and its customer sign an agreement for a so-called "preferred Check-Credit Plan," which is described in the application as a "revolving loan account, combined with personal checking privileges." Under the agreement for this plan when a customer's check, drawn under the plan, is presented to the bank it pays the same, thereby making a loan to its customer "for the amount drawn." These loans are to be repaid monthly, which payments are to be "one-twelfth of the amount of your maximum credit." These "payments are due each month as long as your account shows a loan balance. . .," the *loan balance* evidently being the difference between the authorized loan and the amount drawn against said loan amount. This account is referred to, in the agreement as a revolving loan account. The customer does not appear to sign any promissory note or other obligation to pay a fixed amount, the amount of the loan being determined from time to time by reference to the checks drawn and the repayments made. It would seem to be impossible to determine the amount of documentary stamp taxes that would be required, as of the date of the signing of the financing agreement, even if the financing agreement be determined to be a written agreement to pay money. The obligation has no fixed amount, although there is therein contained a fixed limitation beyond which the account may not pass. Although this agreement differs in many respects from those considered above, there is little, if any, difference between them in legal effect.

As to the three plans before us, we hold that the above stated question must be answered in the affirmative.

059-90—April 30, 1959

**CRIMINAL PROCEDURE**  
**DETERMINATION OF MENTAL CONDITION OF**  
**DEFENDANT—DISINTERESTED QUALIFIED**  
**EXPERTS UNDER §917.01(1), F. S.**

To: *Quentin V. Long, Assistant State Attorney, Fort Lauderdale*  
**QUESTION:**

In construing §917.01, F. S., would the provision requiring the appointment of two disinterested, qualified experts to examine the defendant and testify at the hearing as to his mental condition be satisfied if the court were to appoint two psychiatrists at the South Florida mental hospital to make the examination and present the testimony at the hearing as to the mental condition of the defendant?

Section 917.01(1), F. S., provides as follows:

If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable grounds to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. *The court may appoint two*

*disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party. (Emphasis supplied.)*

As was said by the Supreme Court of Florida in *State ex rel. Huie v. Lewis*, 80 So. 2d 685, 690, with reference to the above quoted statutory provision:

The only requirement is that there be appointed "two disinterested qualified experts."

I think that psychiatrists qualify as experts within the contemplation of §917.01, and there is nothing in the law which forbids the appointment of psychiatrists at the South Florida mental hospital. Therefore, I am of the opinion that it would be lawful and proper to appoint them if they are disinterested.

Consequently, assuming that the said psychiatrists are disinterested, your question is answered in the affirmative.

059-91—May 4, 1959

### COURTS

#### COURT COSTS IN SUPPORT ACTIONS—WAIVER IN CASES OF INDIGENCY—§88.151, F. S.

To: *Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

#### QUESTION:

**What is the legal provision for the waiving of court costs in cases of indigency where a mother is attempting to obtain support from an absent parent?**

Since your question speaks of a mother attempting to obtain support from an absent parent, I assume that the mother in question resides in Florida and that the absent parent, the father, resides in another state.

Under §88.151, F. S., a mother is not required to pay court costs in this state when she initiates a support action in Florida under the reciprocal enforcement of support act against a father residing in another state.

I think that the question of whether court costs in such a case are to be waived in the state in which the father resides depends upon the law of that state, not upon the law of Florida. The question then arises as to how you can ascertain the law of any particular state on this point.

Section 14 of the reciprocal enforcement of support act reads as follows (Uniform Laws Annotated, 1957 Ed., Vol. 9C, p. 44):

§14. *Costs and Fees.*—A court of this state acting either as an initiating or responding state may in its discretion direct that any part of or all fees and costs incurred in this state, including without limitation by enumeration, fees for filing, service of process, seizure of property, and stenographic service of both plaintiff (petitioner) (complainant) and defendant (respondent), or either, shall be paid by the county (city, municipality, state, or other political subdivision thereof). Where the action is brought by or through the state or an agency thereof, there shall be no filing fee.

You can ascertain which states have adopted a statutory pro-

vision substantially like said §14 by consulting the statutory notes which follow said section in said volume of uniform laws annotated, and the statutory notes in the cumulative annual pocket part for said volume. It is probable that still other states have insolvency statutes which permit the waiver of costs in support cases brought by indigent plaintiffs, and the states which have such statutes can readily be ascertained by correspondence.

Your letter also mentions illegitimate children and therefore I assume that you are interested in the question of waiver of costs in support actions brought in behalf of such children. In some, but not all, states actions in behalf of illegitimate children may be maintained under the reciprocal enforcement of support act. The table entitled "Basic duties of support imposed by state law" which is found on pp. 10 and 11 of said volume of uniform laws annotated indicates that in some states either parent is liable for the support of their illegitimate children and that in some of the other states the father is liable for such support. In only those states which have statutes requiring a father to support his illegitimate children can an action be maintained in favor of such children under the reciprocal enforcement of support act. In the states in which such actions can be brought under said act, I think that the same rule as to the waiver of costs would be applied as is applied in those states to actions brought under said act in behalf of wives and legitimate children.

059-92—May 11, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
COUNTY COMMISSIONERS' AUTHORITY TO ALLOW DE-  
PARTMENT OF PUBLIC WELFARE TO ADMINISTER  
AND DISBURSE COUNTY FUNDS—CH. 414,  
§§409.02(2) AND 414.12, F. S.**

To: A. J. Thomas, Jr., County Attorney, Starke

QUESTION:

**May the Bradford county board of county commissioners allow the department of public welfare to administer and disburse the funds by it budgeted each year for public welfare and aid?**

I understand that it has been the practice of the board in the past to turn over \$350 each month to the department of public welfare office at Green Cove Springs. These funds were then disbursed by the welfare department for the Bradford county paupers' fund, emergency grocery orders, and medicine for the indigent of that county. A complete monthly accounting for the use of this money was submitted by the welfare department to the board of county commissioners.

The state welfare board is authorized to accept on behalf of the state department of public welfare such duties in respect to public aid or social welfare as may be delegated to it by any agency of the federal government, state government, or any county or municipal government; and may act as the agent of such governmental units in the conduct and administration of public aid and *social welfare activities* and in the disbursement of funds received from such governmental units for public aid and social welfare purposes within the state. (§409.02(2), F. S.).

The poor mothers with dependent children law, Ch. 414, F. S.,



authorizes the board of county commissioners to designate county welfare boards to administer said law, and further authorizes the board of county commissioners to disburse the authorized appropriation and tax levy to be disbursed by the welfare board. (§414.12, F. S.).

The above sections appear to authorize the board of county commissioners to arrange with either the state welfare board or a county welfare board to administer a welfare program within the county. I point out however that where the county turns over its welfare funds to either the state or county welfare board for the administration of the welfare program, the preaudit function of the clerk of the circuit court as county auditor must be preserved.

It is my opinion that this can best be accomplished by establishing a revolving fund with either the state or county welfare board, which would be reimbursed only after proper vouchers for the disbursement of such fund were audited by the clerk of the circuit court and approved by the board of county commissioners.

Your question is answered in the affirmative.

059-93—May 11, 1959

#### PUBLIC BUSINESS

#### EXPENSE OF PREPARING CONTRACT AND BOND COPIES PURSUANT TO §255.05, F. S.

To: Robert L. Howell, Clerk Circuit Court, Apalachicola

#### QUESTION:

**Is a county required to furnish, without charge, a certified copy of a contract and bond for the construction of a public building to a subcontractor having an unpaid claim for labor and materials under such contract?**

Section 255.05, F. S., relates to bonds of contractors constructing public buildings and suits by materialmen, and provides, among other things:

Any person, making application therefor, and furnishing affidavit to the treasurer of the state of Florida, or any city, county, political subdivision, or other public authority, having charge of said work, that labor, material or supplies for the prosecution of such work has been supplied by him, and payment for which has not been made, *shall be furnished with certified copy of said contract and bond, upon which, said person, supplying such labor, material or supplies shall have a right of action, and may bring suit in the name of the state of Florida, or the city, county, or political subdivision, prosecuting said work, for his use and benefit, against said contractor, and sureties, and to prosecute the same to final judgment and execution; provided, that such action, and its prosecution, shall not involve the state of Florida, any county, city or other political subdivisions, in any expense.* (Emphasis supplied.)

The intention of the legislature in enacting a law is the law itself and must be enforced when ascertained, though it may not be consistent with the strict letter of the law (Knight & Wall Co. v. Tampa Sand Lime Brick Co., 46 So. 285, 55 Fla. 728; Curry v. Lehman, 47 So. 18, 55 Fla. 847; Ervin v. Peninsular Tel. Co., 53 So. 2d 647; Beebe v. Richardson, 23 So. 2d 718, 156 Fla. 559).

In determining legislative intent, the courts may consider language used, general policy of law on subject, objects which legislature had in mind in enactment of legislation, purpose sought to be accomplished by such legislation and nature of subject being legislated upon (*Aboud v. City of Jacksonville*, 80 So. 2d 443).

The proviso of §255.05, F. S., to the effect "that such action, and its prosecution, shall not involve the state, any county, city, or political subdivision in any expense" clearly reveals a legislative intent that the state and its political subdivisions shall not be called upon to bear any expense in connection with the enforcement of materialmen's or mechanics' claims against contractors performing work on public buildings.

I am informed by the state treasurer's office that it has long been the policy of the state to require persons requesting certified copies of contracts and bonds for the construction of public buildings under the provisions of §255.05, F. S., to pay the expenses of the state in supplying copies of such contracts.

In view of the legislature's intent in the enactment of §255.05, F. S., as determined under the rules of statutory construction set forth above, and the long-standing policy of the state to charge for the preparation of copies of contracts and bonds under this section, it is my opinion that the county may require persons requesting certified copies of contracts for the construction of county buildings under the provisions of §255.05, F. S., to pay the expense of preparing such copies.

Your question is answered in the negative.

059-94—May 19, 1959

#### TAXATION

LICENSE AND LICENSE TAXES PRESCRIBED BY §205.17—  
MILK VENDING MACHINES, EXEMPTION—CHS. 6924, 1915;  
14491, 1929; 18011, 1937 AND 20956, 1941 AND  
CH. 205; §§205.59, 205.63, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are milk vending machines, operated by dairymen in this state to vend milk produced by them on their dairy farms in this state, entitled to the exemption from licenses and license taxes provided by §205.17, F. S.?**

Section 205.17, F. S., provides, in so far as here material, that "all farm and grove products and products manufactured therefrom, except intoxicating liquors, wine or beer, shall be exempt from all forms of license tax, state, county and municipal, when the same is being offered for sale by the farmer or grower producing the said products..." As the vending machines here involved appear to be situated on the lands of the dairymen forming a part of their dairy operations, the second sentence of the first subsection of said §205.17, relating to sales at farmers markets, does not seem to be here involved. Present §205.17, F. S., was derived from Ch. 18011, 1937, as amended by Ch. 20956, 1941. Similar provisions have been in the statute laws of this state for many years (§21, Ch. 14491, 1929; §996, R. G. S., 1920; §1, Ch. 6924, 1915).

Section 205.63, F. S., provides in part that "every person who operates for profit any machine, contrivance or device which

is set in motion or made or permitted to function by the insertion of a coin or slug, shall pay a license tax....” Our legal problem is the application of §205.17 to vending machines vending milk, produced in the dairy of the operator of such machines, in the light of §205.63 above. Section 205.63 was derived from §19, Chs. 18011 and 20956, 1937 and 1941; the provision in §205.17 exempting farm and grove products, above quoted, was derived from §25 of said Chs. 18011 and 20956. When construing a section of a statute we must look to the entire statute and not merely one section or portion thereof (see *Amos v. Conkling*, 99 Fla. 206, 126 So. 283; *Heriot v. Pensacola*, 108 Fla. 480, 146 So. 654; *Harris v. Bowden*, 112 Fla. 591, 150 So. 259; *Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333; *Foley v. State*, Fla., 50 So. 2d 179; *Opinion to the Governor*, Fla., 60 So. 2d 321).

In *Johns v. Weeks*, 140 Fla. 141, 191 So. 187, the court had for consideration the application of §205.17 to §205.59, F. S., which latter section required of every person trading, buying, bartering, serving or selling tangible personal property an occupational license thereunder, concerning which the court said that “in the face of a provision of this kind, exempting farm and grove products from all forms of license taxes when sold by the grower, said provision being a part of the licensing act (Ch. 205, F. S.), it would be unheard of to contend that the tax could be legally imposed on the producer when selling his products at a wholesale farmers’ produce market. It (§205.17, F. S.), in other words, lifted all farm and grove products out of the classification of ‘tangible personal property.’” In this case the court stated that it “takes knowledge of a consistent policy on the part of the legislature for years to exempt the producers of farm and grove products from all forms of license tax to dispose of what he produces.” This brings us to the question of the status of the milk sold through the vending machine as a farm or grove product, or a product manufactured therefrom.

In addition to grains, hays, cotton, fruits, vegetables, etc., usually grown on farms, “farm products” have been held to include cattle, horses, poultry and other livestock (35 C. J. S. 750, notes 19 and 20) as well as the production of milk, butter, eggs, etc. (*District of Columbia v. Oyster*, 15 D. C. 285, text 286, 54 Am. Rep. 275; *Philadelphia v. Davies*, 6 Watts & S (Pa.) 269, text 279; *Beyer v. Decker*, 159 Md. 289, 150 A. 804, text 805; *Keeney v. Beasman*, 169 Md. 582, 182 A. 566, text 569, 103 A. L. R. 1515, text 1519; *Whitney v. Watson*, 85 N. H. 238, 157 A. 78, text 80; *Greischar v. St. Mary’s College*, 167 Minn. 100, 222 N. W. 525, text 526; *Lincoln v. Murphy*, 314 Mass. 16, 49 N. E. 2d 453, 146 A. L. R. 196, text 199; *Deutschmann v. Board of Appeals of Canton*, 325 Mass. 297, 90 N. E. 2d 313, text 315; *Kimball v. Blanchard*, 90 N. H. 298, 7 A. 2d 394, text 396). In *Lincoln v. Murphy*, supra, the court remarked that “one of the chief characteristics of a farm ordinarily is the use of the land for the production of crops by the cultivation of the soil, but farming activities are not confined to the tilling of the land and the harvesting of crops, land may be utilized for grazing by livestock, or in raising hay for cows for the production of milk and other dairy products....”

Section 205.17, F. S., was doubtless enacted for the benefit of the farmers of the state, not for the benefit of persons engaged in manufacturing and similar pursuits. It was not intended to

include those who process and sell in this state milk and milk products produced in other states and not in this state (*Lincoln v. Murphy*, supra). Premises in this state devoted to the processing of milk and milk products, but upon which no food is produced and no farming equipment or housing for livestock is maintained, would not seem to be within the purview of said §205.17, F. S. For milk and milk products to be within the purview of §205.17, F. S., the same must have been produced in this state by and through farming operations; mere processing in this state is not sufficient to bring milk and milk products within the purview of said section. Milk produced upon a farm but sold to another for processing and sale is likewise not within the act. Milk produced within this state but mixed, to any appreciable extent, with milk purchased, in connection with processing, is likewise not within the said section of the statute.

The above stated question is, therefore, answered in the affirmative; provided, the milk sold through the vending machines complies with the last above paragraph hereof. Any person selling milk, through a vending machine, which does not comply with the last above paragraph would be in violation of said §205.17, F. S., and would have to procure a vending machine license under §205.63, F. S.

059-95—May 19, 1959

#### CRIMINAL PROCEDURE

#### PAYMENT OF WITNESS FEES AND MILEAGE FOR COURT APPEARANCES TO SPECIAL DEPUTY SHERIFFS— §902.19(4), F. S.

To: *Rodney B. Thursby, Sheriff, Volusia County, DeLand*

#### QUESTION:

**Is a special deputy sheriff, who is not on the sheriff's payroll, entitled to witness fees and mileage when testifying in criminal proceedings?**

Your question is, no doubt, prompted by §902.19(4), F. S., which provides:

No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence.

I have held that law enforcement officers are entitled to witness fees and mileage when testifying in counties other than where they are employed, hold office or reside. (See A. G. O. 057-151, p. 184 dated June 7, 1957).

It is, therefore, only necessary to determine in this opinion whether or not a special deputy, who receives no compensation from the state or county is precluded from receiving witness fees in the county in which he "holds office, is employed, or has his residence."

In answering your question, I assume that the deputy is not compensated in any way from public funds for the services rendered. That is, he is not paid either by the sheriff or the county for any function as a law enforcement officer.

My predecessor held, in opinion 048-88 (A. G. O. 1947-48, p.



595), dated March 12, 1948, that non-paid deputy sheriffs are not entitled to witness fees or mileage when summoned to testify in the trial of a case in court. As qualified by this opinion, I am unable to agree with the former attorney general.

I find no Florida cases passing upon the question which you present. Therefore, I must depend upon a construction of the statute based upon legislative intent; particularly that part of the statute which provides that no law enforcement officer "...employed or paid by the state or any county... shall be entitled to witness fees... in the county in which he holds office, is employed, or has his residence." (Emphasis supplied.)

It is my belief that §902.19(4), F. S., was intended to preclude a law enforcement officer from receiving double compensation from the county or state for the performance of his duty. The word "employed" is, therefore, intended to mean one who is compensated for the work performed. Black's Law Dictionary, 4th Ed., defines "employment" as being "the act of hiring, implying a request and a contract for compensation," and "employ" as "a request and a contract for compensation..." 30 Corpus Juris Secundum, Employ, p. 223, says that the word generally denotes regular employment as distinguished from casual, incidental or occasional employment. The same volume of C. J. S., defining employee, states:

... While generally defined as one who performs services for another for hire, salary, or wages, the word does not necessarily connote the payment of compensation, although it may generally denote regular employment as distinguished from casual, incidental, or occasional employment...

Employ or employee is not a word of art, but takes color from its surroundings (30 C. J. S., Employee, p. 226). The context and connection in which it is used must be examined to determine who is included.

Until such time as a court of competent jurisdiction determines the question, I am of the opinion that a special deputy, who receives no compensation from any public fund, is entitled to witness fees and mileage, when he appears as a witness in a criminal trial.

Your question is answered accordingly.

059-96—May 20, 1959

#### CRIMINAL PROCEDURE

PAYMENT OF EXPENSES INCURRED IN PROCURING PICTURES FOR USE IN TRIAL OF CRIMINAL CASE—§9, ART. XVI, STATE CONST., §27.271 AND CH. 129, F. S.

To: Gordon G. Oldham, Jr., State Attorney, Leesburg

#### QUESTION:

Where pictures are necessary to the state's case in the trial of a felony, is the cost of taking or procuring such pictures a state or county expense?

Section 9, Art. XVI, State Const., provides that "in all criminal cases prosecuted in the name of the state, when the defendant is insolvent or discharged, the legal costs and expenses, including the fees of officers, shall be paid by the counties where the crime is committed, under such regulations as shall be prescribed by law..." (Emphasis supplied.) Prior to the 1894 amendment of this section it required that "the state pay the legal costs and expenses, including the fees of officers..."

You mention §27.271, F. S., which provides in part that "state attorneys and assistant state attorneys shall be reimbursed for all necessary expenses incurred in the performance of their official duties for stationery, stamps, the printing of necessary legal forms, and telephone and telegraph service." We are inclined to the view that the word "for" above is a limitation upon the phrase "all necessary expenses" and should not be read "including"; especially, in the light of said §9, Art. XVI, State Const.

We gather from your said letter that "these pictures were necessary for the state's case in the trial of both felonies, in which there are currently informations filed in Sumter county...." We gather from this that these pictures are part of the costs and expenses in a criminal case prosecuted in the name of the state, and therefore within the purview of the above constitutional provision. The provisions in Ch. 129, F. S., relating to the county's fine and forfeiture fund, implements said constitutional provision (§9, Art. XVI). It is, therefore, my opinion that this item of expense for these pictures is, an item of trial expense in a specific criminal case and is payable by the county. Such an item is not an office expense item of your office, such as stationery, stamps and legal forms.

059-97—May 21, 1959

#### COUNTY SEATS

UNLAWFUL USE OF MONEY IN ELECTION TO CHANGE COUNTY SEAT—CONSTRUCTION OF §§138.11, 99.011, 99.061, 99.161(4) (a), (7), 104.061 AND 104.371, F. S.—PURCHASE OF ADVERTISING BY PRIVATE INDIVIDUALS

To: Charles W. Luther, County Attorney, DeLand

#### QUESTION:

May individuals, after an election for the change of a county seat is called, through the use of newspaper advertisements, editorials, radio or television broadcasts, disseminate information as to the advisability or inadvisability of moving the county seat and as to the costs of a new courthouse and the fact that the present courthouse has a reverter clause in its title in the event it has ceased to be used for a county courthouse and county seat, without being subject to prosecution under §138.11, F. S.?

Section 138.11, F. S., provides:

Any person using money, goods or chattels in any election to change the county seat of any county, to secure votes or influence for any place as the county seat of any county in this state, shall, upon conviction thereof, be imprisoned in the state prison not exceeding two years. (Emphasis supplied.)

Section 138.11, F. S., is an act against corrupt practices in connection with an election to locate the county seat. The purpose of such acts is to preserve the purity of elections and to prevent the improper influencing of voters (29 C. J. S. Elections 216(a). See also 20 C. J. S. Counties §58(b)).

As early as 1868 the legislature of this state saw fit to condemn corrupt practices in connection with elections by enacting the following statute:

If any person by *bribery*, menace, threat, or other *corrupt* means or device whatsoever, either directly or indirectly, attempts to influence any elector of this state in giving his vote or ballot, or to deter him from giving the same, or disturb or hinder him in the free exercise of the right of suffrage at any election within this state, and shall be convicted thereof, such person so offending shall be fined not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both fine and imprisonment. (Bush's Digest, Laws of Florida, Chapter LIII (3), p. 260.)

Although §138.11, F. S., since its enactment has escaped judicial examination, such has not been the case with other sections of the election laws designed to accomplish the same purpose by the regulation of campaign spending.

The following language of Justice Hobson in the case of *Smith v. Ervin*, 64 So. 2d 166, pronounces the philosophy of this type of legislative control. In considering the regulatory provisions of campaign expenditures under §99.161(4) (a), (7), F. S., the court said:

With reference to this legislation, I do not see how any thinking man can doubt that the Legislature was inspired to pass this statute because of the ever-increasing influence of money and self-serving segments in our system who were seeking through the power of money to rule in a way; . . . the legislature was confronted with what it deemed, with good reason, to be a possible destruction of free elections when it passed this act. Anyone who has read the newspapers for the past decade has seen with alarm the *ever-increasing expenditures in our elections*; and as one of the results, the ever-increasing scandals in public life, and with betrayals of the public trust by those who have been elected through the instrumentality of the use of money and the control of the mediums by which the people have been acquainted with men and issues.

So that while, so far as the radio is concerned, I cannot see where the issue of free speech is involved at all, even if it is, the legislature was justified in invoking the police power to put a curb on this ever-growing evil.

Without discussing the details, this law does not prohibit anyone from making a speech advocating the candidacy of a candidate. The only thing it does is to require that that contribution shall be had upon the authorization of that candidate or his duly appointed agent and that it shall be reported by the candidate or his treasurer and become a part of the public reports.

In the *Maxcy, Inc., v. Mayo* case, 103 Fla. 552, 139 So. 121, 123, the Supreme Court announced this doctrine:

"When put to the choice by the practical necessities of the case, the Legislature may exercise its power to suppress an evil by prohibiting entirely a stated practice out of which that evil largely grows, even though by so doing, innocent acts may be forbidden and long-established customs of the people thenceforth made unlawful."

And in the case of *Hunter v. Owens*, 80 Fla. 812, 86 So. 839, our Supreme Court used this language:

"The wisdom, necessity, expediency, feasibility, and

probable success of a governmental statutory project are not subject to judicial review, where the statute is not clearly a violation or evasion of organic law and has substantial basis in a lawful public purpose within the scope of the police power." (Emphasis supplied.)

While the election statutes regulate advertising only by or on behalf of those persons who have announced their candidacy for office, §§99.011, 99.061, 99.161, 104.371, *Ervin v. Capital Weekly Post*, 97 So. 2d 464 (1957), it appears that §138.11 condemns *any* expenditures to secure votes or corruptly influence the result of an election for any place for the county seat of any county in this state.

Every influence upon official action is not against public policy. It is only that which is immoral in its conception, or tends to impair official fidelity, or otherwise contravenes the established interest of society (*Currier v. U. S.*, 106 C. C. A. 654, 184 Fed. 700, 13 A. L. R. 738. See also 18 Am. Jur. Elections 339).

The dictates of good government require, among other things, a well informed public freely casting its individual votes in elections. In construing statutes, rules of construction are applied if possible which will avoid their colliding with constitutional limitations. We think §138.11 can and should be construed as not being in conflict with the constitutional guarantees of freedom of speech and press. I do not believe that the legislature intended by enacting §138.11, F. S., to prohibit the dissemination of news and views concerning an election to determine the location of the county seat by the press or other similar media. It is my opinion that this section only condemns the use of money to buy individual votes or to influence any person or persons in a corrupt manner in an election held on the question of changing a county seat. Section 104.061, F. S., sets forth some of the activities which the legislature has pronounced as corrupting influences on elections and should serve as a guide to determine what activities would be classed as corrupt or improper influence under §138.11, F. S.

In view of the above authorities, it is my opinion that the purchase of newspaper advertising space, television and radio time, distribution of handbills, etc., which are generally recognized as legitimate and permissible in any election, is not prohibited by §138.11; nor would newspaper editorials or news items appearing in newspapers or broadcasts by radio or television come under the ban of said section. However, any use of money for the specific purpose of buying votes or otherwise corruptly influencing persons to vote one way or the other on the question of changing the county seat would be prohibited by this section.

059-98—May 25, 1959

#### LEGISLATION

#### SPECIAL OR LOCAL LAWS—CONSTRUCTION OF §21, ART. III, AND §6, ART. IX, STATE CONST., RELATING TO REFERENDUM ELECTIONS

To: *Wm. S. Boylston, State Representative, Tallahassee*

#### QUESTIONS:

1. Where, in the absence of a notice published in accordance with §21, Art. III, State Const., a local or special act is to be submitted to a referendum, must it be approved (a) by a majority of the qualified electors of



the territory affected, (b) by a majority of those voting, (c) by a majority of the freeholders who are electors, or (d) may more than a majority be required by the legislature for approval?

2. Where the territory affected by the act is more or less than a county or municipality, should it be submitted only to those electors within the affected area?

3. May such an election be held at the same time as a primary or other election and along with the same?

4. Where proper notice of intention to apply for local or special legislation has been published and proof thereof established in the legislature as required by §21, Art. III, State Const., may the legislature nevertheless in its discretion still submit the act to a referendum?

Under said §21, Art. III, State Const., no special or local legislation may be enacted unless there be established in the legislature proof of the publication of a notice of intention to apply therefor as required by said section or in lieu thereof the act "contains a provision to the effect that the same shall not become operative or effective until ratified or approved at a referendum election to be called and held in the territory affected in accordance with a provision therefor contained in such bill or provided by general law." The proviso contained in the 1928 amendment provided that an act not noticed by publication as required might be submitted to a referendum to become operative or effective when "ratified or approved by a majority of the qualified electors participating in an election called in the territory affected by said special or local law." (Emphasis supplied.) The 1928 requirement was approved by a majority of the qualified electors participating in the referendum; the 1938 amendment made a considerable change in this connection in that the referendum is to be in accordance with a statutory provision, either in the local act itself or by general law. An election of qualified electors was changed by the 1938 amendment to an election in accordance with a statutory provision contained in the local act or provided by general law.

In *Stewart v. New Smyrna Inlet Dist.*, 100 Fla. 1126, 130 So. 575, an act of 1929 provided for a referendum to the "duly qualified electors who are freeholders" residing in the district affected, which was held violative of the above mentioned 1928 amendment which required a referendum to the qualified electors of the district affected. *State v. Port St. Joe, Fla.*, 47 So. 584, text 585, arose subsequent to the 1938 amendment, upon a special or local act submitted to a referendum, under §21, Art. III, State Const., of freeholders who were qualified electors of the area affected by the act. This was upheld and approved by the court. In this case the court discussing the 1938 or present amendment of §21, Art. III, State Const., said that "this amendment eliminated the requirement that referendums be submitted to 'qualified electors' and clothed the legislature with power to regulate them as it saw fit." To the same effect see also *State v. County of Sarasota, Fla.*, 62 So. 2d 708, text 712, where an election was submitted for ratification "by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing" in the area affected. In the latter case the election served two purposes (1) the ratification of bonds under §6, Art. IX, of the state

constitution, as well as (2) a referendum under §21, Art. III, State Const. These observations seem to answer question 1; under the rule in *State v. County of Sarasota*, supra, the legislature has power to regulate elections under §21, Art. III, as it sees fit, so long as other provisions of the constitution are not violated.

Both in the 1928 amendment, as well as in the present or 1938 amendment, the election under said §21, Art. III, is to be called and held "in the territory affected" by the local or special act. These observations seem to answer question 2 in the affirmative. The election is to be submitted to the affected area, not to the county or counties, or the municipality, wherein the affected area may be located.

We find *no provision* or requirement in either §21, Art. III, of the 1928 and 1938 constitutional amendments *that the referendum elections thereunder be submitted alone and with no other elections*; there being no such limitation no limitation would seem to have been contemplated. The election in *State v. County of Sarasota*, supra, was construed as both an election under §6, Art. IX (bond election) and an election under §21, Art. III, (referendum) State Const. This seems to indicate *no requirement* that referendum elections under §21, Art. III, be held separate and apart from other elections. The legislature "looks to the constitution for limitations on its power, and if (such limitations are) not found to exist, its discretion reasonably exercised is the sole brake on the enactment of legislation," (*Pinellas County v. Laumer, Fla.*, 94 So. 2d 838, text 840). We find nothing in the state constitution prohibiting the holding of a referendum election under §21, Art. III, State Const., along with another election, unless the laws relative to such other election would prohibit.

Where proper notice of intention to apply for local or special legislation has been duly published and proof thereof established in the legislature as required by §21, Art. III, State Const., so that there may be no question of compliance with said §21, Art. III, State Const., the legislature being limited only by its discretion reasonably exercised in the enactment of legislation (*Pinellas County v. Laumer, supra*), and "having acquired absolute jurisdiction and power to enact the law upon compliance with the notice provisions, the legislature could validly condition the adoption of the act upon approval of those voters whom the legislature considered most vitally interested in the matter" (*Pinellas County v. Laumer, supra*), including its "approval by a vote of the qualified electors of the whole county." The act involved in *Pinellas County v. Laumer, supra*, embraced the zoning of lands "in the unincorporated areas of" Pinellas county, but the act (adopted pursuant to notice duly published and proven in accordance with §21, Art. III, State Const.) was submitted to the qualified voters of the county (municipalities and unincorporated areas). These observations answer question 4 in the affirmative.

From the above and foregoing it seems that (1) it is within the discretion of the legislature to whom the referendum will be submitted and the majority to be required, so long as other constitutional provisions are not violated; (2) §21, Art. III, State Const., contemplates a referendum to the area to be affected by the proposed act; (3) referendums under said §21, Art. III, may be held along with other elections unless the laws provide otherwise; and (4) where an act is properly enacted pursuant to notice duly published and established under §21, Art. III, State Const.,

the legislature may nevertheless require the submission of such act to a referendum to such area as it may elect.

059-99—May 25, 1959

### GOVERNMENTAL ENTITIES

IMMUNITY OF DISTRICT FROM MUNICIPAL BUILDING RESTRICTIONS AND REGULATIONS—CHS. 7081, 1915, 18838, 1937, 27805, 1951, 57-1773; CH. 526 AND §526.12, F. S.

To: *John L. Burns, General Counsel, Port of Palm Beach District, Palm Beach*

### QUESTIONS:

1. Must the port of Palm Beach district obtain a building permit, and comply with building and public safety regulations, required or adopted by the city of Riviera Beach, in the construction of storage facilities for port and commerce use in connection with the operation of the port?

2. Should question 1 be answered in the negative, do the exemption and rights of the port district extend to its lessees when engaged in port activities?

The boundaries of the port of Palm Beach district (see §1, Ch. 7081, 1915) and of the city of Riviera Beach (see §1, Ch. 57-1773, 1957) overlap; the city of Riviera Beach being wholly within the boundaries of the port district. The establishment of the port of Palm Beach district has been upheld by the courts of this state (*Hunter v. Owens*, 80 Fla. 812, 86 So. 839; *Sovereign Camp, etc. v. Lake Worth Inlet Dist.*, 119 Fla. 782, 161 So. 717, 99 A. L. R. 1482) as a special taxing district designed for the maintenance of an inlet or waterway between Lake Worth and the Atlantic ocean, which was, by said Ch. 7081, "found and declared to be necessary for the maintenance of the health of the inhabitants of the territory embraced in said district and for the convenience, comfort and welfare of said district and the inhabitants thereof." (§5, Ch. 7081, 1915). The district is given the power of eminent domain for requiring lands, rights-of-way, and other property needed for the carrying out of its powers and duties (§7, Ch. 7081, 1915). Under Ch. 27805, 1951, the district is authorized to construct and maintain warehouses, storage, docking or terminal facilities, and other works in connection with the operation of their waterways and port. Any such facilities by the port district in the city of Riviera Beach would lie both within the district and within said city.

The city of Riviera Beach has, under Art. I, Ch. 18838, 1937, the usual powers and jurisdiction of an incorporated municipality, including the abatement and removal of nuisances, including things "detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the" said city (subsection 16); "to regulate the size, character and kind of materials and construction of buildings, fences and other structures; . . . to establish fire limits . . . and direct that any and all future buildings within such limits be constructed in whole or in part of stone, natural or artificial, concrete, brick, iron or other fire-proof materials (subsection 18); to license, regulate, suppress or prohibit the sale of firearms . . . kerosene, gasoline, oils and all other combustibles, explosives and inflammable materials . . .

(subsection 19). We have here two agencies of the state whose powers, duties and operations may well overlap as to certain features.

"Property of the state is exempt from municipal regulation in the absence of a waiver on the part of the state of its right to regulate its own property; and such waiver will not be presumed. The municipality cannot regulate or control any property which the state has authorized another body or power to control. Thus it has been held under some statutes that, where the legislature has placed the control of the public schools in boards of education, the municipality has no power to regulate the construction of public school buildings, but under other statutes creating school districts a school building within the municipal territory must comply with the municipal requirements." (62 C. J. S. 319-320, section 157). Generally "the state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifested. . . ." (82 C. J. S. 554, §317). See also 9 Am. Jur. 202, §6; annotation in 31 A. L. R. 450, et seq. and subsequent cases cited in connection with the said annotation. There are some cases that seem to hold that, although the state and its agencies are not required to obtain building permits from a municipality, that, in the absence of other regulatory statutes or rules, the state and its agencies should conform their buildings and structures with municipal ordinances and regulations designed for public safety and welfare in so far as reasonably possible (see *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442; annotation in 31 A. L. R. 450; *Salt Lake City v. Board of Education*, 42 Utah 540, 175 P. 654; *Bredick v. Board of Education, Mo.*, 213 S. W. 2d 889).

There appears to be a controversy between the municipality and the port district concerning the location and establishment of certain storage facilities and tanks upon the lands of the port district for the storage and distribution of liquefied petroleum gas entering the state through the port in interstate (and possibly foreign) commerce for sale, distribution and use in Florida and especially the area within the state near the said port. An examination of Ch. 526, F. S., reveals that the legislature of this state has, by §§526.12 et seq., of said Ch. 526, adopted extensive state regulation upon the storage and sale of liquefied petroleum gases in this state by and through regulations made and promulgated by the state treasurer as ex officio state fire marshal. One of the duties of the state fire marshal is to make, promulgate and enforce regulations setting "forth the minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling, transporting . . . and utilizing liquefied petroleum gases. . . . Said regulations shall be such as are reasonably necessary for the protection of the health, welfare and safety of the public and persons using such materials." Such regulations and standards of the national fire protection association are to be used by the state fire marshal as a guide for the rules and regulations to be adopted by him. Such rules and regulations have been made and promulgated and are being enforced in accordance with the said Florida statutes. Persons violating such rules and regulations are subject to criminal penalties and to suspension and



revocation of licenses held by them under said Ch. 526, F. S. This statute leaves little, if any, regulation to local authorities especially as to the size, sufficiency and location of storage facilities and tanks.

Upon the above statutes, authorities and observations, question 1 should be answered in the negative, as the port district is a governmental agency set up by the legislature (see *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 77 Fla. 742, 82 So. 346, holding the said drainage district a governmental agency of the state).

Question 1 having been answered in the negative it becomes necessary that we answer question 2 also. Doubtless any lessees of the said port district would be persons, firms and corporations using the port of the district and its facilities for commercial purposes who, by the very nature of their business, must maintain facilities, in connection with their business, at the port. One of the facilities which would have to be maintained at or near the port, by those who import and distribute liquefied petroleum gases through and from the port in question, would be storage facilities for the liquefied petroleum gases purchased and sold by them. These are necessary facilities that may be furnished by the port district itself or which may be maintained by the dealers in such gases at or near the port. This presents the question of whether or not the immunity of the port district may be extended to its lessees of necessary port facilities or space to facilitate the importation and distribution of liquefied petroleum gases through the said port. The municipal regulations here considered are similar in nature to zoning regulations. In this regard it has been held that the immunity of the governmental agency or body from zoning regulations extends to its lessee, which such lessee is engaged in some of the activities in which the governmental agency or body is authorized to act or engage in. Here the storage facilities are necessary whether owned and maintained by the port district or the dealer in the liquefied petroleum gases. Where the port district leases space from lands owned by it to a person importing and distributing liquefied petroleum gases through and from the said port, it appears that such lessee would be entitled to the immunity of the lessor from municipal regulations. If such facilities are not located upon property of the district, or not directly used in connection with the importation and distribution of goods moving in commerce, it is doubted that the immunity will apply. In this connection see annotation in 61 A. L. R. 2d 972; *Aviation Services, Inc. v. Board of Adjustment*, 20 N. J. 275, 119 A. 2d 761; *Hill v. Collingswood*, 9 N. J. 369, 88 A. 2d 506; *Nichols Engineering and Research Corp. v. State, Fla.*, 59 So. 2d 874.

It, therefore, appears that a limited affirmative answer should be given question 2. The purposes and use of the leased property is a material factor in answering this question.

059-100—June 2, 1959

## FREEHOLDER ELECTIONS

## CONSTRUCTION OF "FREEHOLDER" AS USED IN §6, ART. IX, STATE CONST.—LEGISLATIVE DEFINITION

To: L. B. Vocelle, State Representative, Tallahassee

## QUESTION:

May the legislature, when providing for freeholder elections required by §6, Art. IX, State Const., define "freeholders" for the purpose of such elections, as excluding homestead owners who hold fee title to their homes but pay no tax thereon?

Section 6, Art. IX, State Const., provides for the issuance of county, municipal and district general obligation bonds "only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the *freeholders* who are qualified electors residing in such counties, districts or municipalities shall participate, to be held in the manner prescribed by law." (Emphasis supplied.) The term "freeholder" as used in said section is not defined, either in said section or otherwise in the said constitution. "Statutes and constitutions in this country should be read in the light of the common law, from which our system of jurisprudence comes" (Meek v. Johnston, 85 Fla. 248, 95 So. 671, text 672; see also Nolan v. Moore, 81 Fla. 594, 88 So. 601, text 605). "A constitution is to be construed in the light of the common law, and the definition or meaning of its terms is generally ascertained by reference to the common law meaning, unless a different intention appears." (16 C. J. S. 117, §36). Unless the context suggests otherwise, words are to be given their natural obvious or ordinary meaning (16 C. J. S. 81 and 82, §19). "Every word of a state constitution should be given its intended meaning and effect, and essential provisions of a constitution are to be regarded as mandatory. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963." (State v. Board of County Commissioners, 147 Fla. 278, 3 So. 2d 360, text 362).

In Crowder v. Phillips, 146 Fla. 428, 1 So. 2d 629, text 630, it is recited that Mr. Justice Terrell holds to the view that the term "freeholder," as used in §6, Art. IX, State Const., did not extend to those homeowners whose homesteads were entirely exempt from taxation; however, it was further stated that "this view is not concurred in by other members of the court." In Coreytown v. State, Fla., 60 So. 2d 482, text 488, the court stated that it had "defined the meaning of a 'freeholder' in Dean v. State, 74 Fla. 277, 77 So. 107, 109, as 'one who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land, may be regarded as a 'freeholder.' Therefore, one who owns an interest, legal or equitable, in land is a freeholder. . . ." The legislature by Ch. 26899, 1951, required that before homesteaders might claim homestead tax exemption under §7, Art. X, State Const., they must "have been legal residents of the state for a period of one year prior to making application for homestead tax exemption." It was held that the group of homesteaders as defined by the constitution itself and as defined by the said act "are quite materially different." The act was held invalid. (Sparkman v. State, Fla., 58 So. 2d 431). See also definition of "freeholder" in 37 C. J. S. 1373 and in 17A Words and Phrases

308-314. The supreme court of this state in construing §6, Art. IX, State Const., has long since treated the reference as being to freeholders according to the common law or usual definition of the term (see *State v. Clearwater*, 135 Fla. 112, 184 So. 675; *Board of Public Instr. v. State*, 122 Fla. 19, 164 So. 516; *Baldwin v. State*, Fla., 40 So. 2d 348; *Holmer v. State*, 158 Fla. 397, 28 So. 2d 586 and other cases).

Any statutory definition of freeholder, as used in §6, Art. IX, State Const., limiting the common law or usual definition of "freeholder," would have the effect of limiting the operation of said section as heretofore construed and excluding electors therefrom. We, therefore, doubt the authority of the legislature to so limit the term "freeholder" as used in said §6, Art. IX, State Const. It has never been the policy of this office to pass upon the constitutionality of a law or proposed law, so we will leave the question unanswered with the above comments.

059-101—June 2, 1959

#### TAXATION

TANGIBLE PERSONAL PROPERTY—CONSTRUCTION OF  
§§200.021 AND 200.13, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Is tangible personal property brought into the state after January 1 but before April 1 of the tax year subject to taxation for that year?**

The supreme court, in *Overstreet v. Ty-Tan, Inc.*, Fla., 48 So. 2d 158, text 160, upon the question of whether tangible personal property brought into the state after January 1, but before April 1, of the tax year was subject to taxation for said tax year under §200.13, F. S., said that said section "is nothing more than a Baedeker addressed to the tax assessor for making up the tax roll and being so, there was no authority for imposing ad valorem taxes on appellee's property it having been acquired and brought into the county after January 1, 1948." This opinion of the court having eliminated §200.13, F. S., from the above question, then we have only §200.021, F. S., to consider in this connection.

Under §200.021, F. S., tangible personal property brought into the state after January 1 and before April 1 of any year shall be taxable for that year only if such property is brought into the state for resale or if the assessor has reason to believe that such property will be removed from the state prior to January 1 of the succeeding year.

Section 200.021, F. S., is the controlling law from which the above stated question is and must be answered.

059-102—June 3, 1959

#### CIVIL PROCEDURE

COURT COSTS—WAIVER—INDIGENTS—SUPPORT ACTIONS  
—§§ 58.09 AND 88.151(2), F. S.

To: *Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

#### QUESTION:

**What is the legal provision for the waiving of court**

costs in case of indigency where a mother is attempting to obtain support for her children from their father, when both the mother and the father reside in this state, but the father is absent from the home?

Section 58.09, F. S., as amended in 1957, is the only law of which I am aware that permits the waiver of court costs in support actions instituted in this state when both parties reside in this state. The first paragraph of said section, setting forth the requirements which must be met before there can be a waiver of costs, reads as follows:

*Costs; right to proceed in forma pauperis.*—Insolvent and poverty stricken persons having actionable claims or demands existing in their favor, shall be entitled to receive the services of the several courts, sheriffs, clerks, and constables of the county in which they reside, without charge or cost to themselves, and no prepayment of cost to any judge, clerk, sheriff or constable in the county, shall be required in any action at law or in equity when the party has obtained a certification of insolvency from the clerk of the court in each action based upon affidavits filed with him to the effect that such applying party or plaintiff is insolvent and unable to pay the charges, costs or fees otherwise payable by law to any of the officers, provided that such affidavits shall be supported and accompanied by written certificate signed by a member of the bar of such county, to the effect that he has made an investigation to ascertain the truth of plaintiff's affidavit and that he believes same to be true; that he has investigated the nature of the plaintiff's claim or demand to be put in suit, and that in his opinion the same is meritorious as a matter of law, and that he has not been paid or promised payment of any fee or other remuneration for his service and intends to act as attorney for the plaintiff without charge or compensation. Provided further, upon the failure or refusal of the clerk of the court to issue a certificate of insolvency, the applicant shall be entitled to a review of his application for such certificate by the judge of the court wherein the cause of action shall lie.

Section 88.151(2), F. S., as amended in 1957 (a part of the reciprocal enforcement of support law), reads as follows:

88.151 *Costs and fees.*—

(2) Regardless of whether this state is the initiating state or the responding state, an individual plaintiff shall be entitled to have performed in this state the necessary services of the clerk, sheriff and court reporter in any proceedings under this chapter including contempt proceedings, without paying any costs or fees or giving any security therefor.

However, it is my opinion that said provision of §88.151 applies only when a support action is maintained under the reciprocal enforcement of support law by a plaintiff residing in one state against a defendant residing in another state. I do not think that said provision applies where the support action is instituted in Florida and both parties reside in Florida.



059-103—June 3, 1959

## LEGISLATION

EFFECTIVE DATE OF LAW ENACTED PURSUANT TO §9(1),  
ART. V, STATE CONST.—§18, ART. III, STATE CONST.

To: Sam M. Gibbons, State Senator, Tallahassee

## QUESTION:

May an effective date, at a time subsequent to the holding of the referendum provided in subsection (1), §9, Art. V, State Const., be provided in an act providing for an additional judge of a criminal court of record?

Said subsection (1), §9, Art. V, State Const., authorizes the state legislature to provide an additional judge for criminal courts of record in counties having a population in excess of 125,000 and not more than 250,000 according to the last decennial federal census or special census authorized by the legislature. Only the last federal census is here involved, there being no applicable special census. Hillsborough county is within this population bracket. Said subsection provides in part that "any law having for its purpose the creating of an additional judge of said court in such county *shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection.*" This provision must be read with §18, Art. III, State Const., which provides that "no law shall take effect until sixty days from the final adjournment of the session of the legislature at which it may have been enacted, *unless otherwise specifically provided in such law.*"

"A statute which has been duly enacted and is complete in its provisions for legal and practical operation may by the statute itself be made to become operative upon the happening of a lawful contingency such as a stated vote of the electors or property owners of the appropriate governmental entity" (San Mateo City v. State, 117 Fla. 546, 158 So. 112, text 114; Gauden v. Kirk, Fla., 47 So. 2d 567, text 575; Pinellas County v. Laumer, Fla., 94 So. 2d 837, text 840). In the latter case notice of intention to apply for legislation had been duly published in accordance with §21, Art. III, State Const.; however, the court held that the legislature was authorized to "condition the adoption of the act upon the approval of those voters whom the legislature considered most vitally interested in the matter." Although the enactment was submitted to a referendum the act itself provided that it would "become effective immediately upon the official determination of the ratification," which may well have been a day subsequent to ratification.

"The legislature 'looks to the constitution for limitations upon its power and if (such limitations are) not found to exist, its discretion is the only brake on the enactment of legislation.'" (Pinellas County v. Laumer, supra). The referendum mentioned in said §9, Art. V, State Const., is designed to permit the people of the county to approve or reject at the polls acts of the legislature providing additional judges therein referred to (see annotation in 50 L. R. A. (NS) 197). "The purpose of the people in adopting the constitution should be deducted from the constitution as an entirety. Therefore, in construing and applying provisions of the constitution, such provisions should be considered, not separately, but in coordination with all other provisions" (Thomas v. State, Fla., 58 So. 2d 173, text 174;

Amos v. Matthews, 99 Fla. 1, 126 So. 308, text 316 and cases there cited). "The rule is firmly established that an amendment duly adopted is a part of the constitution and is to be construed accordingly. . . . If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people." (Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892, text 900 and 901). The constitution is to be construed in the light of the common law (Meeks v. Johnston, 85 Fla. 248, 95 So. 670; Nolan v. Moore, 81 Fla. 594, 88 So. 601). A constitutional provision providing for initiative and referendum leaves the legislative proceedings thereunder subject to all other provisions of the constitution not inconsistent therewith (Annotation in Ann. Cas. 1916B 820).

The provisions in subsection (1), §9, Art. V, State Const., although it provides that any act of the legislature providing for an additional judge thereunder "*shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection,*" no mention is directly made of the effective date of the act. Nothing appears in said subsection in conflict with §18, Art. III, State Const., which authorizes the legislature to specifically provide in such law for its effective date. To construe subsection (1), §9, Art. V, State Const., as making the act immediately effective upon its approval at the referendum thereunder is to hold that said subsection conflicts with said §18, Art. III, State Const.; the phrase "*shall not become effective unless ratified by a majority of the participating voters of the county in an election presenting the same for approval or rejection,*" does not seem to contemplate the fixing of an effective date. The provision seems to declare that approval at such an election is a condition subsequent to the act becoming effective, not that it is to become effective upon approval at such election.

Although the question is one that may be finally answered by the courts, we view said subsection (1), §9, Art. V, State Const., as not conflicting with §18, Art. III, of the same constitution, so as to prohibit the legislature fixing an effective date for an act, conditioned upon its approval under said subsection (1) prior to the effective date fixed by the legislature under said §18.

We would answer the above question in the affirmative.

059-104—June 4, 1959

#### CORPORATIONS

STATUS OF FLORIDA CORPORATION UPON EXPIRATION  
OF ITS CHARTER—FORMER §§611.32 AND  
612.47 AND §608.30, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

#### QUESTION:

What is the status of a Florida corporation upon the expiration of its charter?

The corporation specifically in question was incorporated under the statutes and laws of Florida, on Aug. 27, 1929, the charter of the said corporation specifically providing that it "shall cease to exist at the end of twenty years from the date of its incorporation," that is, on Aug. 27, 1949. The fact that the charter of the said corporation had expired on Aug. 27, 1949, appears to have been overlooked by the said corporation, its officers and the

secretary of state, and it has been filing annual reports and paying the annual charter taxes due up to the present time. It appears that the said corporation was chartered under Ch. 10096, 1925, subsequently appearing as Ch. 612, F. S., now superseded by Ch. 608, F. S., as adopted by Ch. 28170, 1953.

Under the statutes in force when the corporation in question was incorporated, and in 1949 when its corporate existence appears to have terminated by reason of the limitation in its charter, it was provided that "all corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by and against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their assets, but not for the purpose of continuing the business for which said corporation shall have been established." (Former §612.47, F. S.). A like provision was contained in former §611.32, and now appears in §608.30, F. S., which consolidated and revised the former sections of the statute. The expiration of the life of the corporation occurred in 1949 while former §612.47 was in full force and effect.

It is noted that under both former §611.32 and former §612.47, F. S., the corporate existence was continued or extended for the three years mentioned and for the purposes therein mentioned "and for no other purpose," under said §611.32, and "not for the purpose of continuing the business for which the corporation shall have been established," under §612.47. Section 608.30, F. S., which is in effect a consolidation and amendment of said §§611.32 and 612.47, provides an extension of the corporate existence for three years for dissolution and distribution purposes "but for no other purpose." Under former §612.48, as well as present §608.30, the directors of the expired corporation are by statute constituted trustees of the property of the expired corporation for the purpose of winding up its affairs and distributing its assets to its stockholders. Under some circumstances such trustees may act as such for as much as 20 years after expiration (§608.30(6), F. S.). These statutes show an intention on the part of the legislature to terminate the business of expired corporations as soon as is reasonably possible.

Although there is some contrary authority "the weight of authority is to the effect that a corporation is dissolved ipso facto, in the absence of provision to the contrary, on expiration of the period of its existence fixed by its charter or by general law, as the case may be . . . since there is no longer any law under which it can legally exist. . . ." (18 C. J. S. 502, §106; see also 13 Am. Jur. 196, §51). There "is not even a corporation de facto" (13 Am. Jur. 196, §51, note 19). "By the weight of authority, a corporation de facto exists when, and only when, there is a law under which such a corporation may lawfully exist, a bona fide attempt to organize under the law and colorable compliance with statutory requirements, and actual user of corporate powers pursuant to such law and attempted organization." (18 C. J. S. 494, §99; 33 A. S. R. 181-184; 94 A. S. R. 594-596). Under early common law real property held by a corporation at the time of its dissolution reverted to the grantor or grantors and personal property was forfeited to the king (10 Cyc. 1301; 19 C. J. S. 1488, §1730; 13 Am. Jur. 1195, §1348). Under some circumstances where the business of a dissolved corporation is con-

tinued after dissolution the stockholders may be held liable as partners (Annotation in 94 A. S. R. 595-596; 68 C. J. S. 463, §40).

The fact that former §611.32 and present §608.30, F. S., provided a three-year extension of corporate functions for expired and dissolved corporations for the purpose of liquidation, and further provided that such extension was "for no other purpose," and former §612.47, provided that such extension was "not for the purpose of continuing the business for which the corporation shall have been established," shows clearly that it was not the intention on the part of the legislature that corporations whose charters have expired or which have been dissolved be permitted to function as de facto corporations. The status of de facto corporations has usually been given to those corporations which have made an attempt to incorporate under existing valid laws which incorporation has been defective for some reason so that they may not be held to be de jure ones.

The corporation in question ceased as a corporation upon the expiration of the three years allowed it for winding up and liquidating its affairs and distributing its assets. If the business has been continued by the officers and directors of the former corporation it has probably been continued as that of a partnership and not a de facto corporation. The fact that annual returns have been received and filed by the secretary of state would not seem to be sufficient to work an estoppel against the state.

059-105—June 8, 1959

#### BEVERAGE LAWS

#### ENFORCEMENT OF MUNICIPAL ORDINANCE REGULATING SALES BY STATE BEVERAGE OFFICERS—PRECEDENCE OF CHS. 29418 AND 29419, 1953, OVER §562.14, F. S.

To: *C. Archie Clement, Municipal Judge, Tarpon Springs*

#### QUESTION:

May a state beverage officer enforce the city ordinances of a municipality regulating the hours of sale of intoxicating liquors, notwithstanding the provisions of §562.14(3), F. S., which states, in effect, that the duty of enforcing the municipal ordinances relating to the hours of sale is that of the sheriff, deputy sheriff and police officers of the municipality and not the duty of the state beverage department?

The supreme court of Florida has held that once a county has voted to allow the sale of intoxicating liquors, wines and beers, the legislature can regulate the liquor business by either general, special or local legislation (*State ex rel Wilder v. City of Jacksonville*, et al, 157 Fla. 276, 25 So. 2d 569).

Acting under that constitutional provision, the legislature, in 1953, passed two special acts, Chs. 29418 and 29419, relating to the regulation of hours of sale of liquors, wines and beers in Pinellas county and these acts, insofar as we can determine, are still in full force and effect.

Chapter 29419 provides for uniform hours during which places of business dealing in alcoholic beverages may be operated in Pinellas county, including beverage places located in the municipalities in such county and that act provides that mu-



municipalities may set a more stringent law by municipal ordinance but cannot change the hours so as to allow more liberal sales.

Sections 7 and 8 of Ch. 29419, provide as follows:

**Section 7. APPLICABILITY TO MUNICIPAL AND OTHER AREAS:** The establishment of uniform hours and all other regulations and exceptions, as provided for in this act, shall be applicable to all establishments and businesses, located within Pinellas county, Florida, including those located in any cities, towns or other municipalities therein; **EXCEPT AND PROVIDED, HOWEVER:** Nothing contained in this Act shall be construed to prevent any such municipality located in Pinellas county from establishing shorter hours or stricter or other regulations, than are herein provided; and that any such shorter hours or stricter regulations, as heretofore or hereafter enacted or adopted by valid municipal law, ordinance or regulation, shall nevertheless govern the hours and operation of any such establishment dealing in alcoholic beverages located within any such municipality.

**Section 8. PENALTIES FOR VIOLATION:** Any person, firm or corporation violating any of the provisions of this act shall be deemed, upon conviction thereof, guilty of a misdemeanor and shall be punished therefor, as provided by law. Further, any violation of any of the provisions of this act by any vendor, or by any of such vendors' employees at his licensed place of business, shall be considered to be grounds for revocation of such vendor's or offender's license or licenses; and it shall be the duty of the state beverage director to revoke or suspend any such license or licenses, as and in such cases as now or hereafter provided by state law.

In the light of this special act and the general principle that special acts normally take precedence over general laws and particularly in the light of the provisions of §8, which requires the beverage director to revoke or suspend a beverage license for violations of the special act, it is my opinion that any city ordinance in municipalities in Pinellas county, relating to the regulation of alcoholic beverages must be considered to have been enacted pursuant to the authority contained in Ch. 29419 and not under the provisions of the general law, §562.14, F. S., and, therefore, it is not only the right, but the duty of the agents of the state beverage department to enforce or assist the municipalities in the enforcement of the so-called hours of sale ordinances and if necessary to individually enforce such ordinances.

059-106—June 8, 1959

#### TAXATION

#### QUADRIPLLEGICS—EXEMPTION FROM AD VALOREM TAXES —EFFECTIVE DATE OF CH. 59-134

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Is the exemption from ad valorem taxes granted by Ch. 59-134, to quadriplegics, applicable to the 1959 tax assessments?

This question is answered in the negative upon the authority of our opinion of Aug. 5, 1957 (057-227) and the opinion of the supreme court in *State v. Green*, Fla., 101 So. 2d 805, and the authorities therein cited and referred to.

059-107—June 8, 1959

#### STATE CORRECTION SYSTEM

EXTRA GOOD TIME ALLOWANCES—COMMUTATION OF SENTENCES—BOARD OF COMMISSIONERS OF STATE INSTITUTIONS—BOARD OF PARDONS—§944.29, F. S.

To: *Lula L. Mullikin, Secretary, Board of Commissioners of State Institutions, Tallahassee*

#### QUESTION:

Where the board of commissioners of state institutions has approved the granting of special gain time to state prisoners who have perfect prison records and whose sentences would normally expire in July, August or September, 1959, in whatever amount is necessary for each individual prisoner to be discharged on July 1, 1959, should this action be concurred in by the board of pardons?

I find no provision of law authorizing the board of commissioners of state institutions to allow extra gain time except §944.29, F. S., reading as follows:

944.29 *Extra good time allowances.*—The board upon recommendation of the director may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry. (Emphasis supplied.)

Therefore, if the special gain time mentioned in your letter is not for meritorious conduct or exceptional industry, I do not think that the board of commissioners is authorized to grant it; however, the board of pardons can effectuate the same result by commuting the sentence of each man involved so that it will expire on July 1.

Therefore, it is my opinion that your question is properly answered in the affirmative.

059-108—June 9, 1959

#### FINANCE AND PUBLIC BUSINESS

CONSTRUCTION OF 1959 GENERAL APPROPRIATIONS ACT WITH OTHER STATUTES—§§216.171(3), 216.23(1), AND 282.01(15) F. S.

To: *Harry G. Smith, State Budget Director, Tallahassee*

#### QUESTIONS:

1. Is §216.171(3), F. S., superseded, repealed or in any manner altered by §15, of the 1959 general appropriations act, insofar as it relates to salaries in excess of \$10,000?

2. Is §216.23(1), F. S., superseded, repealed or in any manner altered by anything in the 1959 general appropriations act?

The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature when it

enacted the law (*Heriot v. Pensacola*, 108 Fla. 480, 146 So. 654, text 656). This intent is to be gleaned from the language of the statute (*Overman v. State Board of Control*, Fla., 62 So. 2d 696), which should be given a rational and sensible one (*Realty Bond and Share Co. v. Englar*, 104 Fla. 329, 143 So. 152), with due regard to its policy and purpose (*Cox v. Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. ed. 260). The entire statute should be given effect (*Alsop v. Pierce*, 155 Fla. 185, 19 So. 2d 799; *Chiapetta v. Jordan*, 153 Fla. 788, 16 So. 2d 641) and all laws relating to the same subject matter should also be examined and reconciled when possible (*Wiggins v. State*, Fla., 101 So. 2d 833). There is no express repeal or amendment of said §§216.171 or 216.23, or any part or parcel thereof. Implied repeals are not favored (*State v. Sarasota County*, Fla., 74 So. 2d 542; *Parker v. City of Jacksonville*, Fla., 82 So. 2d 131) and one act should not be deemed to repeal another unless they are manifestly inconsistent with and repugnant to each other (*American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524).

The provisions in §§216.171 and 216.23, or like and similar provisions, were contained in the general appropriations act of 1949 (Ch. 25370) and some of such provisions had been inserted in successive general appropriations act for several legislative sessions prior thereto. A like or similar provision to §216.171(5) was contained in the general appropriations act of 1939, and was involved in *State ex rel. Williams v. Lee*, 140 Fla. 380, 191 So. 697 and *Knott v. Lee*, 144 Fla. 164, 197 So. 681). The case of *Lee v. Dowda*, 155 Fla. 68, 19 So. 2d 570, involved certain provisions inserted in the 1943 general appropriations act designed to control expenditures thereunder, some of which were held to be violative of §30, Art. III, State Const., *confining general appropriations bills to the making of appropriations only*.

Sections 216.171 and 216.23, F. S., are not subject to the limitations contained in §30, Art. III, State Const., and so long as they do not conflict with subsequent statutes, including valid provisions in general appropriations act, would appear to be operative notwithstanding the general appropriations act. The problem seems to be one of conflict of laws. We find nothing in the general appropriations act and §216.171(3), and §216.23(1), F. S., which are manifestly inconsistent with or repugnant to each other to such an extent that they may not be reconciled and permitted to stand with a valid field of operation for each.

Each of the above stated questions is, therefore, answered in the negative. Said subsections (1) and (3) may be applied without raising any irreconcilable conflict with the said 1959 general appropriations act.

059-109—June 10, 1959

#### REGULATION OF PROFESSIONS AND VOCATIONS FLORIDA BEAUTY CULTURE LAW—TRAINING COURSES FOR TEACHERS IN BEAUTY CULTURE SCHOOLS—

§§477.08(6) AND 477.14, F. S.

To: *Ethel M. Manning, Executive Secretary, Board of Beauty Culture, Tallahassee*

#### QUESTIONS:

1. May the Florida state board of beauty culture

issue a certificate of registration to a school of beauty culture to provide for teacher training course?

2. If so, may the board require an applicant for an original teacher's certificate of registration to take such a training course, prior to the issuance of such certificate?

Section 477.14, F. S., relating to annual renewal of certificates; required training for teachers; training course by board, provides, among other things:

"... At least once every two years every registered beauty culture teacher shall attend a course of study and training of not less than two weeks continuous duration in a school to be approved by the state board of beauty culture, and a failure to comply with the provisions hereof shall be cause for the refusal to renew a certificate of registration upon application, or for the cancellation thereof by the board, provided, that from and after the year 1949 the board shall offer a course of study and training for beauty culture teachers, which course shall include lecturers and professional demonstrators who are expert in the latest and most advanced methods of beauty culture. Such course shall be available to registered beauticians as well as beauty culture teachers. . . ."

In view of the foregoing, it would appear that the board might approve schools for teacher training in addition to the course offered by the board, which training is a prerequisite to annual renewal of the teacher certificate of registration. Question 1 is answered in the affirmative.

Replying to question 2, it is my opinion that the requirements a teacher must meet in applying for the original certificate of registration are set up by statute in §477.08(6), F. S., and that the board cannot increase those qualifications. Question 2 is answered in the negative.

059-110—June 15, 1959

### AERONAUTICS

#### STATE AERONAUTICS FUND—DISPOSITION OF FUND HELD FOR USE OF COUNTIES—EFFECT OF CH.

59-179—§§330.06-330.26, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Should the funds that have accrued to the counties under §§330.06-330.26, F. S., upon the effective date of Ch. 59-179, be reverted to the general revenue fund?

2. If question 1 is answered in the negative may the Florida development commission, as agent for the counties, expend such funds for aviation purposes within the counties to which accrued?

Under said §§330.06-330.26, F. S., funds derived from the issuance of duplicate certificates of registration for aircraft were deposited into a separate fund known and designated as the "state aeronautics fund," to be distributed as was provided in and by §330.23, F. S. (§§330.10 and 330.11, F. S.). The provisions in said §§330.10 and 330.11 were repealed by said Ch.



59-179 as of July 1, 1959. Section 330.23, F. S., which made provision for the distribution and use of the "state aeronautics fund," that is, the aircraft license moneys, was amended by said Ch. 59-179, and a new distribution of the aircraft license moneys provided.

Under §330.23, prior to the 1959 amendment, 50% of the aircraft license moneys collected were allocated to the counties as therein provided, to be used either for general county purposes or "for aeronautical purposes within that county if the county so desires." Under the said section as amended "all moneys collected . . . under the provisions of this chapter (Ch. 330, F. S.) shall be deposited in the general revenue fund," and the expenses incident to the administration and enforcement of Ch. 330 are to be paid from the general revenue fund. There is included in the 1959 general appropriations fund (Item 16, §1, thereof) an appropriation from the general revenue fund for its aviation department.

Prior to the 1959 amendments above mentioned the entire proceeds of the "state aeronautics fund" were credited to the Florida development commission, one half thereof to be expended by the commission "for aeronautical purposes as required in the interest of improving the safety of flying within the state," and the other half to be paid "to the several counties of the state in proportion to the amount of funds collected from the registration of aircraft in that county," with authority in such counties to "designate the Florida development commission as their agent to expend such funds for aeronautical purposes within that county if the county so desires." There is no requirement that the share of the counties in the fund aforesaid be expended or used during the tax year, the biennium, or any other period of time.

Generally, statutes expressed in general terms and in the present tense will be given prospective effect and thereafter applicable to conditions coming into existence thereafter (State v. Miami, 101 Fla. 292, 134 So. 608, text 609; State v. Jacksonville Terminal Co., 90 Fla. 721, 106 So. 576; State v. City of Jacksonville, Fla., 50 So. 2d 532). "Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation." (50 Am. Jur. 500, §478). In Independent School Dist. No. 1 v. Common School Dist. No. 1, 56 Idaho 426, 55 P. 2d 144, 105 A. L. R. 1267, school funds were improperly apportioned by the county to six school districts in the county, under the existing statutes. Subsequent to this improper distribution the statute was changed so as to provide another plan of distribution. It was held that the districts' rights to a proper distribution under the old law were not defeated by the repeal of the existing statute and that they might require a proper adjustment of the apportionments previously made notwithstanding the repeal of the statute under which the distribution was made.

Certain funds under the statutes prior to the adoption and effective date of Ch. 59-179, supra, had been distributed to or for the account of certain counties under said §330.23. Several of these counties, prior to the effective date, and, in most if not all cases, prior to the time the act became a law, had been directing and authorizing the Florida development commission to administer and expend their allotment of such funds within the

county for "aeronautical purposes within that county." Although the funds in question may have been under the supervision and direction of, and maybe held by, the said commission, it appears that such funds were no longer state funds but county funds, or funds held in trust for county purposes. The state funds mentioned in §330.23(1) were state funds on deposit in the state treasury; and it further appears that the 1959 general appropriations act makes provision for the carrying on of the state's portion of the work contemplated from and after July 1, 1959. No provision was expressly made in the general appropriations act for like or similar county aeronautical purposes.

We are, therefore, of the opinion that the funds mentioned in question 1 were, at the time of the enactment of said Ch. 59-179, funds held by the counties, or by the Florida development commission or in their name as trust funds for the use and benefit of the counties. Question 1 is answered in the negative. Question 2 is answered in the affirmative, as the funds therein mentioned appear to be county funds or funds held in trust for the counties' use.

059-111—June 15, 1959

# **TAXATION**

## **SALES TAX—CONSTRUCTION OF §212.08, F. S., AS AMENDED BY CH. 59-402**

To: *Board of Commissioners of State Institutions, Tallahassee*

### **QUESTION:**

**What is included in the following exception contained in §212.08(7), F. S., as amended by section 2 of committee substitute for senate bill 786, of the 1959 regular session of the Florida legislature, to wit: "... except public works in progress or for which bonds or revenue certificates have been validated on or before Aug. 1, 1959"?**

The title to said senate bill 786 gives notice that one of its purposes is to "remove the exemption from sales taxes of alcoholic beverages and contractors employed by any government agency," and to provide an effective date. We are here concerned only with the removal of the exemption as to contractors employed by governmental agencies.

Under said §212.08(7), F. S., as amended by senate bill 786, a general exemption from the sales taxes is provided for "the United States government, the state or any county, municipality or political subdivision of this state; *provided*, this exemption shall not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof where such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision thereof, *except* public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959. . . ." (Emphasis supplied.) The act is by its own terms to become effective on July 1, 1959. There is at least an apparent conflict between the above quoted exception within the above proviso in the subsection as amended. The proviso was not in the bill as introduced but was inserted in the committee substitute.

"The natural and appropriate office of a proviso is to create

a condition precedent, to except something from the enacting clause, to limit, restrict or qualify the statute in whole or in part, or to exclude from the scope of the statute that which otherwise would be within its terms." (50 Am. Jur. 457, §436). "The office of a proviso in a statute is not to enlarge or extend the act of which section it is a part but rather to be a limitation or a restraint upon the language which the legislature has employed. A proviso is to be construed strictly and limited to objects fairly within its terms, or to qualify or restrain its generality." (Farrey v. Betten-dorf, Fla., 96 So. 2d 889, text 893). An exemption in a statute exempts something from its operation (82 C. J. S. 889-890, §382); here the exemption is "public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959."

Said §212.08(7), F. S., exempts from the Florida sales and use taxes "sales made to the United States government, the state or any county, municipality or political subdivision of this state," provided, however, under the *proviso* this exemption is denied to "contractors employed either directly or as agents of such government or political subdivisions" where the property in question "goes into or becomes a part of" state or political subdivision public works, there being *excepted* from the said proviso "public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959." This leads to a consideration of the reason for the proviso and the intention of the legislature in adopting it. In construing provisos and exceptions they must be construed together with the enacting clause with the view of giving effect to each and ascertaining the intention of the legislature (50 Am. Jur. 451 and 456, §§431 and 435). Often public works must be planned months or weeks before the letting of the contracts therefor and the beginning of the construction. Sometimes, especially when elections are held in connection with bond issues, the estimates are made by the public officers as to costs and expenses of construction as a predicate for advertising for and awarding construction contracts, or for ascertaining the approximate cost thereof, where bonds or revenue certificates are to be issued.

To make sales taxes effective on purchases by contractors when they could not have anticipated such taxes, none being required at the time of the making of the construction contract, might well impose an undue burden upon the contractor. To impose such taxes on construction, where the financing was made prior to the adoption of said committee substitute for senate bill 786, including the validation of bonds or revenue certificates, the state or its subdivisions and agencies might well be forced to reduce the contemplated construction so as to take care of increased bids by contractors to protect themselves against the taxes to be levied.

The reference to "August 1, 1959" as to "public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959," is not an effective date for the act or any part thereof but is an exemption from the operation of the subject matter of the act between its effective date and Aug. 1, 1959, as to the matters mentioned in the said exception. In other words, the act goes into effect July 1, 1959, and as of that date the comptroller can promulgate necessary regulations and take such other actions as will be necessary to put it

into effect. This is referred to as an example of one of the ways the act will operate as of July 1 but is not intended to outline all of the act's operative effects as of that date. The taxes imposed by the amendment upon the contractors mentioned are not to be imposed as to "public works in progress or for which bonds or revenue certificates have been validated on or before Aug. 1, 1959," notwithstanding the act fixes July 1, 1959, as its effective date.

It is our opinion that the test for determining if a "public work is in progress" is whether a governmental unit has entered into a bona fide public works contract on or before Aug. 1, 1959. It is reasonable to assume that if a public construction project has reached the stage where a formal contract has been entered into on or prior to Aug. 1, 1959, it "is in progress" sufficient for all intents and purposes to satisfy the act. All of the preliminaries will have been satisfied, including the plans and surveys, the estimate of costs, the calling for bids and the acceptance of the lowest and best bid and the awarding of the contract.

The validation of bonds and revenue certificates contemplated by the act refers to validation in the circuit court.

59-112—June 15, 1959

**TEACHERS' RETIREMENT SYSTEM  
EXEMPTIONS PROVIDED BY §238.15, F. S.—FEDERAL  
INTERNAL REVENUE TAX LIEN—CH. 238, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

Where a notice of federal internal revenue lien has been served upon the state comptroller, as to the interest of a member of the teachers' retirement system of this state, should the said state comptroller recognize any requisitions by such member for benefits or withdrawals of contributions, unless and until such lien be withdrawn, released or satisfied?

Under §238.15, F. S., "the pensions, annuities or any other benefits accrued or accruing to any person" under the provisions of the Florida retirement system for school teachers (Ch. 238, F. S.), "and the accumulated contributions and cash securities in the fund created under this chapter are exempt from any state, county or municipal tax of the state, and shall not be subject to execution or attachment or any other legal process whatsoever, and shall be unassignable," with certain exceptions not here material.

It seems to be admitted by all concerned that the person against whom the notice of levy of April 30, 1959, was issued is a member of the said teachers' retirement system. The regional commissioner of the internal revenue service, embracing this state, with offices in Atlanta, Georgia, by letter under date of May 29, 1959, addressed to Hon. Spessard Holland, U. S. senator, relative to the said notice of lien, advises that "as to the circumstances of the levy in question here, I am advised that . . . the main purpose of the levy was to prevent the withdrawal by the taxpayer of the sum of . . . (the member's contributions) . . . in a lump sum from the retirement fund. . . . No attempt has been made by the internal revenue service to enforce such levy by requiring the payment to the government of the amount of



the taxes owed. The purpose of such levy up to now has been to hold the funds in status quo."

Under §6331, title 26, of the U. S. code, federal levies upon the property and property rights of federal taxpayers for the collection of federal taxes owed by them is authorized; and under §6334, of said title 26, the property and property rights of federal taxpayers are set out. State exemption laws are not applicable as exemptions under the federal laws unless adopted by federal law (*Cannon v. Nichols*, CCA Colo., 80 Fed. 2d 934). In other words, the exemptions mentioned in said §238.15, F. S., have no application to obligations for the payment of federal internal revenue taxes and the liens thereof.

It does not appear necessary that we here determine the rights of members of the teachers' retirement system in the contributions made by them to the retirement fund or their other interests, if any, in and to the fund, either directly or indirectly, other than to say that if it be determined that the taxpayer and member of the retirement system may, under the laws of Florida, has any right to withdraw his contributions in whole or in part, or to obtain payment of any other interest or interests belonging to him in and to such system or its funds, that such funds would appear to be so encumbered by the levy as to not be payable to the member without the state comptroller incurring personal obligations to the federal government under the rule recently announced in *Sims v. U. S.*, 3 L. ed. 2d Adv. 667. The status quo of the member's interest should be maintained unless and until the lien is released or is otherwise terminated.

The above question is, therefore, answered in the negative.

059-113—June 15, 1959

#### TAXATION

OCCUPATIONAL LICENSES—OPERATION OF SLENDERIZING SALON; REGISTRATION UNDER CH. 480, F. S.—EXEMPTIONS—CHS. 205 AND 480, §§480.01(1), 480.02(3) AND 480.03

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Is a person operating a slenderizing salon, under the so-called Slim-A-Rama system, or some similar system, required to register as a masseur or masseuse under Ch. 480, F. S., as a condition to obtaining an occupational license under Ch. 205, F. S.?

2. If the general answer to question 1 is in the affirmative, does the fact that the person owning and operating the said slenderizing salon is a duly registered nurse affect the answer?

We are advised that the equipment used in such a salon includes a Gyro-Flex table, Gyro-Robot, Gyro-Trim chair, finger figure control, manual bicycle, electric bicycle or slendercycle, shimmy belt, three dimensional couch, floor roller, roller off floor and chaise lounge with electric gyration and gyration wave action. We have before us two newspaper advertisements concerning the so-called gyro-lator Slim-A-Rama way, published within the last 60 or 90 days, which is therein referred to as slenderizing and reducing equipment. It seems evident from the pictures

shown in one of the said advertisements that some of the machines are electrical apparatus or devices. The equipment is advertised as being designed to correct both overweight and underweight.

It is "unlawful for any person or persons to operate or conduct any *massage establishment*," or to practice as masseur or masseuse in this state until and unless he be qualified as a masseur or masseuse and obtains a registration certificate under Ch. 480, F. S. (§480.02, F. S.). Section 480.02(3), F. S., provides in part that "no occupational license, state, county or city, shall be issued to any person unless he or she shall have in his or her possession a certificate of registration and current certificate of renewal, duly authorized and signed by the board of massage examiners," of this state. This provision seems to include occupational licenses and license taxes within the purview of Ch. 205, F. S. A masseur or masseuse, within the purview of Ch. 480, as defined in §480.01(1), F. S., "shall be deemed to be a person who practices, administers or teaches all or any one or more of the following subjects and methods of treatment, viz: who administers or teaches treatments with any *mechanical or electrical apparatus for the purpose of body slenderizing, body reducing, or body contouring. . .*" or who "administers or teaches all or any one or more of the following subjects and methods of treatment, viz: oil rubs, salt glows, hot or cold packs, all kinds of baths, including steam rooms, cabinet baths, sitz baths, colon irrigation, *body massage either by hand or by any mechanical or electrical apparatus or device* (excluding fever therapy), applying such movements as stroking, friction, rolling, *vibration*, kneading, cupping, pettrasage, rubbing effleurage, tapotement." (Emphasis supplied.) The practice of massage is declared by the statute as including any of the above.

Under said §480.01(1), prior to the said amendments, "body massage, either by hand or with any mechanical or electrical apparatus for the purpose of body massaging, reducing or contouring," was deemed to be within the statute. Under the section as amended "body massage either by hand or any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, *vibration*, kneading, cupping, pettrasage, rubbing effleurage, tapotement," is deemed to be within the statute. The statute prior to the 1955 amendment of said §480.01 by Ch. 29971, was involved in *Florida Board of Massage v. Underwood*, Fla., 45 So. 2d 184, wherein the court remarked that "the legislature has clearly limited such electrical apparatus to that which rubs, strokes or kneads the body according to the general definition of the term 'massage.'" The amendment changed the phrase "mechanical or electrical apparatus," as used in the law prior to amendment, to "mechanical or electrical apparatus or device" and extended the term "rubs, strokes or kneads," to applying "such movements as stroking, friction, rolling, *vibration*, kneading, cupping, pettrasage." It may well have been the intention and purpose of the legislature to extend the statute to the "hip chair, arm chair, hobby horse, foot table couch . . ." held by the court in *Florida Board of Massage v. Underwood*, supra, not to be within the statute. It, therefore, appears that question 1 should be answered in the affirmative, unless the said statute be subject to constitutional prohibitions. This office leaves constitutional questions to the courts and does not pass upon them.

The answer to question 1 having been answered in the affirma-

tive, it becomes necessary that question 2 be answered. Under §480.03, F. S., "registered nurses under the laws of this state" are exempted from said Ch. 480, F. S.

Under the police power of the state it may enact laws for the preservation of public health, general welfare, public safety, public morals, and comfort (16 C. J. S. 917, et seq., §§182-187; *State v. Knott*, 114 Fla. 120, 154 So. 143, text 145). Chapter 480 is based upon the police power of the state to protect generally the health, welfare and safety of its citizens and residents. "Ordinarily, a strict or narrow construction is applied to statutory exceptions to the operation of laws. This rule is particularly applicable, where the statute is promotive of the public welfare, or where, in general, the law itself is entitled to a liberal construction." (50 Am. Jur. 451-452, §431). "Exceptions, in a statute, as a general rule, should be strictly construed, and, at the same time, exceptions should be reasonably construed; they extend only as far as their language fairly warrants, and all doubt should be resolved in favor of the general provision rather than the exception" (82 C. J. S. 891-894, §382). An exception in a statute is similar to a proviso in effect; in this state provisos are strictly construed and limited to objects fairly within its terms (*Farrey v. Bettendorf*, Fla., 96 So. 2d 889). The above mentioned exemption of certain professions, including nurses, contained in §480.03, F. S., may well have been intended as exempting nurses, etc., from the operation of the provisions of Ch. 480, F. S., only to the extent their professional duties as nurses may include massage. The exemption affects nurses, as well as the other professions mentioned in said §480.03, only to the extent that their professional duties and services overlap that of masseurs and masseuses under Ch. 480, F. S.

The above authorities, statutes and observations answer the above stated questions.

059-114—June 16, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
USE OF COUNTY FUNDS FOR SURVEYS IN CONNECTION  
WITH ELECTION TO RELOCATE COUNTY SEAT—CH.**

138; §§129.07 AND 11.031(2), F. S.

To: *Charles W. Luther, County Attorney, Volusia County, DeLand*

**QUESTION:**

Prior to the filing of a petition for the changing of a county seat under Ch. 138, F. S., may the board of county commissioners of Volusia county expend the sum of \$3,000 at the request of the circulators of such a petition for the purpose of obtaining a survey and feasibility report which would show the following?

1. Present population and the population of various sections of the county with projections of population to be experienced in 10, 20 and 30 years.

2. Cost of remodeling and expanding, including the acquisition of the required land of the present courthouse facility to take care of these population projections.

3. Cost of a new facility in a new location outside of the county seat to meet the requirements of a projected population.

#### 4. Method of financing:

- a. Required remodeling and expansion in DeLand.
- b. A new facility in a new location outside of the county seat.

It is well settled in this state that boards of county commissioners may exercise only that authority expressly conferred on such boards by statute or authority necessarily implied to carry out such expressed authority (*Crandon v. Hazlett*, 26 So. 2d 638, 157 Fla. 574).

The authority of the board of county commissioners in connection with an election to locate the county seat is set forth in Ch. 138, F. S. Section 138.02 requires the board to hold an election upon receipt of a proper petition praying for a change of location of the county seat. Within five days after such election the county commissioners must publicly canvass the same, *and the place receiving a majority of all the votes cast shall be the county seat for the next ten years* (§138.06, F. S.).

The duties of the board of county commissioners under Ch. 138 are mandatory and void of discretion. It is the right of the voters to determine whether the county seat should be relocated. Until such time as the election for the change of location of the county seat is held and that question is determined, the board is without authority to expend county funds to determine the cost of a new county facility in a new location outside the county seat to meet the requirements of a projected population. Unquestionably, if the voters determine that the location of the county seat shall be changed, the board of county commissioners would then be authorized, in preparation for the construction of a new courthouse, jail, etc., to expend county funds for gathering information for the purpose of determining the proper size of the facility to be constructed, etc.

The authority of the board to make expenditures for such purposes is subject to the limitation that funds be budgeted for such a program because under §129.07, F. S., it is unlawful for the board of county commissioners to expend or contract for the expenditure, in any fiscal year, more than the amount budgeted for each item in each fund; and members of the board so contracting and their bonds are liable for such excess indebtedness so contracted for.

It is my opinion that until such time as an election is held in Volusia county to determine the question as to whether the county seat shall be relocated, the board of county commissioners is not authorized to expend county funds for the purpose of conducting surveys to gather information concerning the cost of constructing new facilities at a prospective county seat or for the financing of such construction. Nor would the county, without special legislation, be authorized to conduct a local census to determine the population of various sections of the county because under the provisions of §11.031(2) "no special county or district census shall be effective for any purpose other than to ascertain the population for the purpose of interpreting an existing law relating to additional judges of the circuit court. . . ."



059-115—June 18, 1959

## TAXATION

COUNTY TAXATION OF MUNICIPAL REAL PROPERTY—  
FAILURE TO SELL THE LAND FOR TAXES AND ISSUE  
CERTIFICATES—§1, ART. IX, §16, ART. XVI, STATE  
CONST., §§192.04, 192.21, 194.47 AND 332.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

## QUESTIONS:

1. Where a municipal corporation owns certain acreage, obtained from the federal government and formerly used as an airport, which is not directly used for municipal purposes, is such property subject to county taxation?

2. If question 1 is answered in the affirmative, how should the taxes assessed be collected, when there was no tax sale held and no tax sale certificate issued to evidence the said tax and tax lien?

Under §1, Art. IX, State Const., the legislature is required to "provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, *excepting* such property as may be exempted by law for *municipal*, educational, literary, scientific, religious or charitable purposes." Under §16, Art. XVI, State Const., "the property of all corporations . . . shall be subject to taxation unless such property be *held and used exclusively* for religious, scientific, *municipal*, educational, literary or charitable purposes." In *Lakeland v. Amos*, 106 Fla. 873, 143 So. 744, text 747, the court, after referring to the above constitutional provisions, stated that "while the organic law intends that the governmental functions and property of municipalities shall not be taxed, the constitution does not exempt the authorized corporate business occupations or proprietary activities of municipal corporations from taxation. The constitution exempts from taxation *not municipal corporations*, but property that is *held and used exclusively* for municipal purposes." To the same effect see also *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134.

In *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470, the municipality had leased certain lands owned by it to the Southern Kraft Corp., for a primary term of 50 years, to be *used* in connection with the operation of the corporation's paper mill located in Bay county. This proceeding had been brought in the circuit court of Bay county, against the county tax assessor, the county tax collector and the clerk of the circuit court for said county to restrain them from assessing and collecting ad valorem taxes against the said property and further to restrain the said clerk from selling or transferring tax sale certificates encumbering the property for unpaid taxes assessed for the year 1930 and subsequent years. The relief sought by the municipality was denied, on the ground that the said properties "*being used* by the Kraft Corporation are not being used for municipal purposes within the meaning of section 16, article XVI, of the constitution of Florida." The cases of *State v. McDavid*, 145 Fla. 605, 200 So. 100, and *State v. Cambell*, 146 Fla. 532, 1 So. 2d 483, involved municipal housing authorities and a legislative inactment declaring their operation to be for a municipal purpose. *Saunders v. Jacksonville*,

157 Fla. 240, 25 So. 2d 648, involved a legislative enactment declaring the furnishing of electrical power outside of a municipality by such municipality for compensation to be for a municipal purpose. These three latter cases do not appear to conflict with the prior above mentioned cases.

Whether or not the property of the municipal corporation mentioned in question 1 is exempt or subject to county ad valorem taxation depends upon the question of whether or not the property is *held and used* for a *municipal purpose* within the purview of said §1, Art. IX, and §16, Art. XVI, State Const. It appears from the file handed us with the request for opinion that some of the land in question has for several years been leased for pasture use. Although it appears from the file that the property in question was purchased from the federal government after the same, previously used as an airport by the U. S., had been declared surplus, so far as we are advised the property is not now used as a public airport; however, this is a question for the local taxing officials. The tax exemption provision (§332.05, F. S.), seems to contemplate the use of the property as an airport for it to be entitled to tax exemption thereunder. We construe §332.05 as being in the nature of a legislative declaration that property used for airport purposes is being used for a municipal purpose (see *State v. McDavid*, supra; *Saunders v. Jacksonville*, supra). The use to which the property in question is being put to is a question of fact to be determined by the local taxing officials.

A reading of the statutes of this state relative to the assessment of real property for ad valorem tax purposes seems to make it the duty of the county tax assessor to ascertain the real property in the county subject to taxation, fix its full cash value and enter the same upon the county tax roll. From these statutes it seems to be one of the duties of the tax assessor to search out taxable property and place the same on the tax roll and assess taxes thereon. It seems evident from the file that the tax assessor for the tax year 1958 determined that the lands of the city in question were not being used for a municipal purpose, within the purview of §1, Art. IX, and §16, Art. XVI, State Const., and were therefore subject to taxation for the tax year of 1958. It appears also, from the file, that the lands had been assessed for taxes for previous years, which taxes the municipality paid. The county tax rolls were equalized sometime around the first of July 1958, and doubtless the board of equalization adjourned sine die several months ago. It seems evident that the 60-day limitation mentioned in §192.21, F. S., within which suits to test ad valorem tax assessments against lands must be brought had expired. There is a presumption that the taxes in question were properly assessed by the tax assessor.

Under said §192.21, "all taxes imposed pursuant to the constitution and the laws of this state shall be a first lien superior to all liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment." This lien appears to have attached as of Jan. 1, 1958. Here, as in *State v. Gay*, 133 Fla. 826, 183 So. 463, "county taxes were paid on the lands in question up to but not including the year . . . (1958) . . . , that the taxes for said year were assessed and became due April first . . . (1959) that said lands should have been sold during the year . . . (1959) for the non-payment of . . . county taxes for the year . . . (1958) and certifi-

cate (issued) . . . but that the tax collector failed and neglected to make such sale and as a result no certificate was or has been issued to any one." It seems evident that no tax sale will be held and that no tax sale certificate will be issued, for the reason that the lands in question were not included in the notice of delinquent tax sale for the year 1959. Notwithstanding the failure of the tax collector to make the required sale and issue a tax sale certificate, for the 1959 sale, the tax lien imposed by §§192.04 and 192.21, F. S., continues to encumber the property in question. Although the failure to publish a tax sale notice may, prior to the enactment of Ch. 10040, 1925 (see §192.21, F. S., and like subsequent acts) have been considered a fatal defect (see *Daniel v. Taylor*, 33 Fla. 636, 15 So. 313), since the enactment of said 1925 act the notice of a delinquent tax sale by the tax collector "is designed more to produce buyers at the sale for the benefit of the state's (county's) revenue than it is to protect any right of the delinquent taxpayer." (*Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333, text 336). Section 192.21 was designed to abolish purely formal defects in tax assessment procedures (*Overstreet v. Gordon*, 121 Fla. 180, 163 So. 477) and to provide for the correction of omissions and commissions of taxing officials.

If the tax assessment in question was authorized by law and was valid, although irregular, the tax lien attached and was not to be defeated merely by the failure of the tax collector to advertise the said lands for delinquent tax sale or to issue a tax sale certificate. Tax liens encumbering real property in this state may be foreclosed in equity. We are of the opinion that a tax lien encumbering real property in this state, although it be not evidenced by a tax sale certificate, may be foreclosed in equity and we see no reason why it may not be included in a foreclosure proceeding pursuant to §194.47, F. S.; however, the court might deem it necessary that a foreclosure sale, like or similar to that usually held in a mortgage foreclosure, should be made under the direction of the court.

It is, therefore, our suggestion that the tax lien in question be certified by the tax collector to the clerk of the circuit court and by him certified to the board of county commissioners for foreclosure in equity.

These observations answer both of the questions above stated.

059-116—June 18, 1959

#### TAXATION

AD VALOREM TAXES AGAINST GASOLINE AND LUBRICATING OILS—VALUATION—CH. 200; §§192.05, 200.01, 200.06, 208.04, 208.44 AND 212.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**When assessing gasoline and lubricating oils, as stock in trade, how should the full cash value of such products be determined for ad valorem tax purposes?**

The attorney general, by opinion of June 25, 1936, advised that there being no "specific statutory exemption of gasoline and lubricating oil from an ad valorem personal property tax, it is . . . my opinion that the statutes contemplate that such gasoline and lubricating oils are assessable as tangible personal property." Such

gasoline and oils appear to be within the definition of "tangible personal property" as set out in §200.01, F. S. Such gasoline and oils are assessable under Ch. 200, F. S., *at their full cash value* (§200.06, F. S.). Such gasoline and oils in the hands of manufacturers, producers, distributors, dealers, and other businesses holding such gasoline and oils as part of their stock in trade would appear to be "stock in trade" within the purview of §192.05, F. S. This brings us to the question of how is the full cash value of gasoline and lubricating oils determined as stock in trade. "The value of personal property for purposes of taxation is to be estimated according to its fair and actual cash market value or the price it would sell for in cash in the usual course of business, and not according to the use made of it by the owner, and not necessarily according to a valuation made by the owner. . . ." (84 C. J. S. 810, §412). Where property comes to the taxpayer burdened by taxes or duties previously paid, such taxes and duties become a part of the valuation of such property (84 C. J. S. 810-811, note 69) such as taxes on beverages, import duties on watches, federal tobacco taxes. A dealer is not entitled to a reduction in the cash value of a motor vehicle because of the payment of a motor vehicle tax (*State v. Minnesota Tax Commission*, 178 Minn. 300, 227 N. W. 43).

As an analogy we refer to sales and use taxes and the consideration going into a determination of the base upon which the taxes are imposed. In this state the base for the levy of sales and use taxes is the "sales price," which is the total amount for which the property, including any services that are a part of the same, is sold for. "Cost price" is defined as the actual cost of the article (§212.02, F. S.). An examination of §§208.04 and 208.44, F. S., discloses that a seven cent gasoline tax is imposed in this state. Although the statutes make the declaration that "this levy of tax is upon the consumer but shall be paid upon the first sale or transfer within this state whether by a distributor or dealer" this tax was held, in *U. S. v. Lee*, 153 Fla. 94, 13 So. 2d 919, to be a tax upon the distributor or dealer (seller) and not upon the purchaser or consumer, although the tax is passed on from the seller to the purchaser. The sales and use tax imposed upon lubricating oils by Ch. 212, F. S., appears to be a tax upon the purchaser or consumer and not the seller, distributor or dealer. (*Spencer v. Mero*, Fla., 52 So. 2d 679). The federal excise taxes on gasoline and lubricating oils (§§4081 and 4091, title 26, U. S. code) is a tax imposed upon the importer, manufacturer or seller and not upon the purchaser or consumer (*Sun Oil Co. v. Gross Income Tax Commission, Ind.*, 149 N. E. 2d 115). Under the state and federal statutes, imposing taxes upon gasoline, and the federal statute, imposing taxes on lubricating oil, the importer, manufacturer or distributor is the taxpayer, and invoices or bookkeeping cannot change the fact that the purchaser is paying the sales prices fixed by the seller and nothing more or less. The purchaser cannot be stipulated into the position of a taxpayer, and the seller into the position of a tax collector (see *Pure Oil Co. v. State*, 244 Ala. 258, 12 So. 2d 861, text 862-863).

From the above and foregoing it appears that the state and federal taxes on gasoline, and the federal tax on lubricating oil, are paid by the importer, manufacturer or distributor, and passed on to the purchasers and consumers not as taxes separate and apart



from the cost price or sales price, but as a part of such price. Such taxes are therefore a part of the price of the gasoline and oil. As above stated, this is not true as to the sales tax imposed by Florida upon lubricating oils, which is a tax consequent of the sale to the purchaser or consumer. The gasoline taxes, and the federal tax on lubricating oils, have become a part and parcel of the purchase price by the time they are sold at retail to the purchaser or consumer. Such taxes have become a part of the valuation of the property (84 C. J. S. 810-811, *supra*). The tax assessor, when fixing the full cash value of gasoline and lubricating oils, for the purpose of fixing the value of the same for ad valorem tax purposes may and should take into consideration the said taxes when considering the value of such gasoline and lubricating oils (but not the state sales or use tax on lubricating oils).

Therefore, when assessing gasoline and lubricating oils, as stock in trade, the tax assessor may take into consideration the sales price of the gasoline, which includes the state and federal taxes on gasoline, and the federal tax on lubricating oils, but not the Florida sales tax on lubricating oils which does not accrue until sold at retail. It is the duty of the tax assessor to fix the full cash value of such gasoline and oils, and in fixing such full cash value he may consider the price of the same commercially; however, such price is only one element in determining the full cash price of the same. Generally, the full cash price of gasoline and oil should be determined under the rules generally applicable in fixing the full cash price of tangible personal property generally. The full cash price of gasoline and oil as stock in trade is not necessarily the price (wholesale, retail, or otherwise) of the said product to the general customers of a filling station.

These observations seem to answer the above question as well as it may be generally answered.

059-117—June 18, 1959

#### PUBLIC LANDS

DREDGING FOR IMPROVEMENT OF NAVIGATION—PINELLAS COUNTY—CHS. 31182, 1955 AND 57-362

To: *Avery W. Gilkerson, Clerk, Pinellas County Water and Navigation Control Authority, Clearwater*

#### QUESTIONS:

1. May the Pinellas county water and navigation control authority grant permission to an applicant to remove silt and accretion to clear a pre-existing channel, without requiring compliance with the conditions of §8, Ch. 31182, 1955, and, if so, is the permit subject to approval of the trustees of the internal improvement fund?

2. The same question is asked as to permission (a) to dredge a channel from a shoreline dock to deeper water; (b) to dredge or construct an access opening from upland canals to navigable water; (c) to clear shoreline areas of mangroves, mud flats, shell banks, so as to make the area generally more attractive.

It is assumed in answering these questions that no material removed from the water will be deposited so as to interfere with navigation, expand areas of existing upland, create new areas, or permit activities which are primarily for the purpose of filling low uplands.

Your letter is prompted by the provisions of Ch. 31182, 1955, which requires a notice to upland owners within 500 feet of the development area, a newspaper publication, and a public hearing.

A casual reading of Ch. 31182, 1955, would indicate that *any* dredge or fill operation within Pinellas county would fall within the purview of the chapter and would be regulated by it. However, a more comprehensive study of this chapter makes it apparent that the legislative intent was to control and regulate the development and filling of submerged lands, but not dredging to improve navigable conditions. This intent is made apparent by the entire chapter. Section 2(a) of Ch. 31182 provides that the Pinellas county water and navigation control authority has the authority to "regulate and exercise control over the dredging and filling of submerged bottom lands in the waters of Pinellas county. . . ." (Emphasis supplied.) Section 4 of the act provides that "the regulation and control of said Pinellas County Water and Navigation Control Authority shall be applicable to filling and dredging of all submerged bottom lands. . . ." (Emphasis supplied.) Section 8 of the act, which requires a fill permit, deals with ". . . dredging, pumping of sand, filling of any submerged lands, extension of lands, construction of islands in, or under said navigable waters. . . ." Section 8(b) provides that a plan of development shall accompany the application and shall be submitted for publication in a daily paper.

These sections which are emphasized in this opinion indicate that the legislature contemplated the regulation of operations which were chiefly to *dredge and fill*.

I do not feel that the legislature intended that the detailed requirements of §8(a) of the act should apply where there would be no filling of submerged lands or extension of uplands. The questions which you have asked deal with the improvement of navigation and removal of undesirable elements by the process of limited dredging. It seems doubtful that any riparian rights of adjoining upland owners could in any way be jeopardized by such operations. I do not feel that an upland owner should be put to the burden and expense of meeting the requirements of §8(a), Ch. 31182, 1955, under the conditions which you have outlined.

This does not mean that the upland owner is not required to submit to your board an application for a permit to undertake these operations. It merely means that the owner will not have to undergo the unnecessary expense of advertising and submitting detailed plans for such development. A copy of any application for dredging only which does not entail filling of submerged lands should be forwarded to the trustees for their consideration and approval as a policy matter only.

With the above qualifications, questions 1 and 2 are answered in the affirmative.

059-118—June 18, 1959

#### SHERIFFS

BUDGETARY PROCEDURE—CHS. 57-368 AND  
59-216; §§30.47-30.49 AND 30.54

To: John A. Madigan, Jr., Attorney, Florida Sheriffs' Association,  
Tallahassee

#### QUESTION:

As to those sheriffs who were excluded from the pro-

visions of the sheriffs' budget law, (Ch. 57-368) but by the provisions of Ch. 59-216, are now included therein, what budgeting procedure should be followed in view of the effective date of the 1959 legislative act of Oct. 1, 1959?

Chapter 57-368, commonly known as the "sheriffs' budget law," had as its purpose the placing of sheriffs upon salaries and abolishment of the fee system. However, certain counties were excluded from its provisions. The 1959 enactment, that is to say Ch. 59-216, specifically repeals the exemption of the counties from the 1957 act. Therefore, said chapter is, upon its face, applicable to all counties of the state. We do not here concern ourselves with population or special acts which may have been enacted at the 1959 session of the legislature and have as their purpose excluding certain counties from the provisions of said Ch. 59-216.

Section 30.49(3) of Ch. 57-368, was amended, but the provisions of subsections (1), (2), (4), (5), (6), (7) and (8) are unchanged. The fiscal year of the sheriff commences Oct. 1 and ends Sept. 30 of the following year. The sheriff is required to certify to the board of county commissioners a proposed budget containing certain items set forth in subsection (2) and the approved budget is included in the county budget.

The problem you present is that since §4 of Ch. 59-216 makes the act effective Oct. 1, 1959, it cannot become operative until the fiscal year beginning Oct. 1, 1960, unless the sheriffs affected by this law submit their budgets and have them approved prior to the fiscal year beginning Oct. 1. The proviso in said §4 reads ". . . provided that budgeting procedures shall be instituted in accordance with existing law." It is ambiguous, but may be susceptible of the interpretation the legislature intended that the sheriffs brought within the provisions of the act should submit their budgets as required by the provisions of Ch. 57-368 (the existing law) except as modified by Ch. 59-216. However, such is not necessary to decide by reason of the application of certain established principles of statutory construction hereinafter referred to.

Where there is an amendment to a section of a statute the amendatory section is substituted for the section amended as a part of the original statute. (*Singleton v. Larson*, Fla., 46 So. 2d 186; *Miami Bridge Co. v. R.R. Commission*, 155 Fla. 366, 20 So. 2d 356; *Stokes v. Galloway*, 61 Fla. 437, 54 So. 437; *Saunders v. Provisional Municipality of Pensacola*, 24 Fla. 226, 4 So. 801.) So the section, as amended, becomes ". . . for all purposes in the future the Section of the original act." (*Miami Bridge Co. v. Railroad Commission*, *supra*, p. 359). The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. (*Burr v. Fla. East Coast R.R. Co.*, 77 Fla. 259, 81 So. 464; *Heriot v. City of Pensacola*, 108 Fla. 480, 146 So. 654, and other cases). The intent of the legislature must be gathered from the language used and the purpose to be accomplished by the statute. (*Whidden v. State*, 159 Fla. 691, 32 So. 2d 577).

Measured by these rules of statutory construction it is clear the legislature intended these sheriffs of the several counties of the state should be subject to the budget law as of Oct. 1, 1959.

In order to effectuate this intent it is imperative that those sheriffs submit their budgets as required by the provisions of the 1957 act after its amendment by 1959 legislative enactment. To conclude otherwise would thwart legislative intent.

Consequently, those sheriffs initially coming within the act as of Oct. 1, 1959, should properly submit their budgets prior thereto in accordance with the provisions of §30.49, F. S., as amended by Ch. 59-216.

This answers the question as definitely as possible.

059-119—June 18, 1959

#### JUDICIAL DEPARTMENT

TAKING AND REPORTING PROCEEDINGS BEFORE GRAND JURY—COMPENSATION OF COURT REPORTER—§§3089-3094, RGS; §3, CHS. 11976, 1927 AND 26584, 1951; §§29.03, 29.04 AND 905.17, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTION:

What compensation is the official circuit court reporter entitled to for taking and reporting proceedings had by or before the grand jury?

Under present §905.17, F. S., the court reporter or stenographer may be present at sessions of the grand jury, except when deliberating or voting. Prior to the adoption of Ch. 26584, 1951, amending said section, no provision was made in the statutes for the taking and reporting of proceedings before grand juries in this state. Under said §905.17, "the stenographic records, notes or any transcript thereof made by the court reporter or stenographer shall be filed with the clerk of the court and kept by him in a sealed container not subject to inspection by the public." This section of the statutes clearly authorizes the taking and reporting of proceedings before the grand jury by the official court reporter. Official court reporters for the circuit courts are authorized by Ch. 29, F. S.

Under §29.03, F. S., the "official circuit court reporter shall be entitled to receive for each day or fraction of a day in which such reporter shall be engaged in reporting testimony and proceedings in a *civil case*" (emphasis supplied) a specified sum, but not less than \$10 for each civil case. Under §29.04, F. S., "each official circuit court reporter shall receive an annual salary" in the amount specified in that section, together with his expenses and travel in the amounts and under the conditions named. No mention is made in the statutes for an express per diem for reporting criminal cases. Special provision is made in §29.03, F. S., for the reporter's compensation for reporting arguments to juries in criminal cases. We are of the opinion that the reporter's compensation for reporting criminal cases is the salary provided in §29.04, F. S.

An examination of §§3089-3094, Revised General Statutes, 1920, reveals that under those sections, the official court reporter was paid a per diem for reporting both civil and criminal proceedings, plus an additional compensation for each folio of the transcript and copies thereof. These statutes originated in a 1903 enactment. This rule appears to have been followed until the adoption of Ch. 11976(3), 1927. Section 3 of that act retained the provision for



a per diem for reporting *civil cases* but dropped it in so far as it related to criminal cases. "To insure the attendance of a reporter," a salary payable from the state treasury was provided by that act. Reading these acts with Ch. 29, F. S., as it now exists, leads to the conclusion that the official court reporter is paid a salary, in lieu of the per diem allowed under the 1903 act for reporting legal proceedings, except as may be otherwise expressly provided.

In view of the above cited authorities it is my opinion that the official circuit court reporter is compensated for taking and reporting proceedings had by or before the grand jury by the salary provided in §29.04, F. S., plus the additional compensation provided by §29.03, F. S., for each folio of the transcript and copies thereof.

059-120—June 22, 1959

#### SCHOOL CODE

LEGAL STATUS OF FLORIDA JUNIOR COLLEGES—§§228.041 AND 228.14, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### QUESTION:

**What is the legal status of Florida's public junior colleges?**

Section 228.041, F. S., defines junior colleges as a part of the public school system and also recognizes that they offer work at the same level as the universities.

Section 228.14, F. S., again defines the junior colleges as a "part of the county school system" and requires that they offer work "parallel to that of the first and second years of work at a senior four-year state institution of higher learning."

Under the provisions of the state constitution, the legislature has plenary power to provide for junior colleges under either state or county management and supervision. The fact that they offer college education but are a part of the county school system is not violative of the state constitution.

It is therefore our opinion that Florida's public junior colleges may be considered both as institutions of higher education and as an integral part of local public school systems. Under the law these colleges provide higher education (defined as post high school) as a part of local public school systems.

059-121—June 23, 1959

#### INSURANCE

PREMIUM TAXES—EXEMPTION—ATLANTIC NATIONAL INSURANCE CO.—§§205.431 AND 205.432 F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

#### QUESTION:

**Is an insurance company entitled to the exemption from premium taxes provided by §205.431, F. S., if the company is organized under the laws of Florida and maintains its corporate records in this state but conducts its business affairs from an office in another state?**

Section 205.431, F. S., provides:

Insurers organized and existing under the laws of this state, as such insurers are defined in and contemplated by §205.43, F. S., and which insurers maintain their home offices in this state, shall not hereafter be required to pay the tax on insurance and annuity premiums, assessments or considerations received from residents of this state now and heretofore imposed by §205.43(2). This exemption provided such domestic insurers shall be effective for the calendar year of 1949 and subsequent years.

You state that as to the particular company in question your investigation reveals that all corporate papers and minute books are maintained in its Miami office. All other functions of the company are performed in its New York office. These functions include: The maintenance of financial records and underwriting records, the issuance and servicing of policies of insurance, the approval of payments of all types of claims, the records to provide policyholders information and service, and the supervision and training of sales and service forces.

While the term "home offices" is not defined in §205.431, F. S., the similar term "regional home offices" is defined in §205.432(2), F. S., as follows:

(2) A regional home office, for the purpose of this section, shall mean an office performing, for an area covering three or more states, the selling, underwriting, issuing and servicing of insurance, including the following functions relating thereto; actuarial, medical (where required), law, approval or rejection of applications for insurance and issuance of policies thereon, approval of payment of all types of claims, maintenance of records to provide policyholder information and service, advertising and publications, public relations, supervision and training of sales and service forces.

It is my opinion that a "home office" within the contemplation of §205.431, F. S., must at least meet the minimum qualifications for a regional home office (excluding the matter of area coverage) as defined in §205.432, F. S. Accordingly, your question is answered in the negative.

059-122—June 24, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS**  
**OUTDOOR ADVERTISING—PROHIBITED ADVERTISING—**  
 §§479.01(7) AND 479.11(1), F. S.

To: Henry C. Hamilton, Prosecuting Attorney Jefferson County,  
 Monticello

**QUESTION:**

What constitutes the outside boundary of a highway under §479.11, F. S.?

479.11 *Certain outdoor advertising prohibited.—*

(1) *Within fifteen feet of the outside boundary of any federal or state highway or within one hundred feet of any church, school, cemetery, public park, public reservation, public playground, state or national forest, or railroad intersection outside the limits of any incorporated city or town. (Emphasis supplied.)*

Section 479.01(7), F. S., provides:

**479.01 Definitions.—**

(7) "Highway" means every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this state, outside of cities and incorporated towns;

In determining what constitutes the outside boundary of a highway within the meaning of §479.11, supra, we must look to the definition of what constitutes a highway under §479.01, supra. It is to be noted that a highway only includes such "way or place" which is used "for purposes of vehicular traffic in this state."

In *Hav-A-Tampa Cigar Co. v. Johnson*, 149 Fla. 148, 5 So. 2d 433, the supreme court of Florida was confronted with the constitutionality of §479.11, F. S. In holding the statute constitutional the supreme court construed the distance of 15 feet to be measured from the state-owned right-of-way rather than from the hard or traveled portion of the highway. This construction of the statute is implicit in the majority opinion in the case and Justice Brown's concurring opinion removes any question to the contrary.

In view of the above, it is my opinion that in determining whether or not advertisements are within 15 feet of the outside boundary of any federal or state highway so as to preclude their use under §479.11(1), supra, the distance must be measured from the outside boundary of the state-owned right-of-way for said highway.

059-123—June 24, 1959

**CRIMINAL PROCEDURE**

**TRANSFER OF INFORMATION FILED IN ABOLISHED  
CRIMINAL COURT OF RECORD TO NEW COURT OF  
RECORD, BROWARD COUNTY—CH. 59-877**

*To: Thomas M. Coker, Jr., County Solicitor, Broward County,  
Ft. Lauderdale*

**QUESTION:**

**May an information originally filed in the criminal court of record in and for Broward county, be transferred to the newly established court of record in and for Broward county, without necessitating a re-filing of said information?**

House bill 1543 (Ch. 59-877), which will become effective on July 1, 1959, established the new court of record in and for Broward county, vesting it with both criminal and civil jurisdiction; and said bill abolished the criminal court of record in said county. House bill 1543 reads in part as follows:

Section 18. Transfer of pending cases. Any case pending in the circuit court of Broward County at the time this act takes effect, and which is within the jurisdiction of the court hereby established, may be transferred to this court of record at the option of the circuit judge presiding in said cause evidenced by a signed order directing the clerk of the circuit court to transfer said cause to the court hereby established. All cases pending in the county court of Broward County at the time this act takes effect shall be transferred by order of the county judge to the court hereby established. *All cases pend-*

*ing in the criminal court of record of Broward County and the court of crimes of Broward County at the time this act takes effect, and which are within the jurisdiction of the court hereby established, shall be forthwith transferred to the court hereby established. (Emphasis supplied.)*

In 21 C. J. S. 206, Courts, §135, the law is generally stated as follows:

*Authority of new or superseding court.* The authority or jurisdiction of the new or superseding court depends, of course, on that vested in it by the constitutional or statutory provision in question. Accordingly, it may be vested with the powers and jurisdiction formerly resting in the old or superseded court, as well as the jurisdiction formerly possessed by itself, if it was already an existing court. If such is the intent of the law, the new court will obtain and may proceed to exercise jurisdiction over causes lawfully transferred to it. (Emphasis supplied.)

In view of the above-stated rule, the determining question is whether house bill 1543 clearly expresses a legislative intent that the informations now pending in the criminal court of record shall be transferred to the new court of record as of July 1, 1959 and proceed in said latter court as though the information had been originally filed therein.

In *Easterlin v. State*, 43 Fla. 565, 31 So. 350, the supreme court of Florida was confronted with a related question. In 1893, the legislature of the state established the county court in and for Alachua county. In 1899, the legislature abolished that court and provided that all suits pending and undetermined in that court should be transferred to the circuit court. The defendant, *Easterlin*, was tried in the circuit court on an information which had been originally filed in the county court, prior to the effective date of the statute abolishing that court. It was the contention of the defendant that he could not be tried on an information which had originally been filed in the county court without a formal certification of transfer of the information by the clerk of that court to the circuit court. The supreme court of Florida, in holding this contention to be without merit, stated (31 So. at 352):

... By such transfer is meant simply that all the record, papers, and proceedings appertaining to said causes shall be transmitted to, and lodged with or in, the respective courts falling heirs to them. By section 15 of article 5 of our constitution, the clerk of the circuit court became the clerk, also, of such county court, upon its establishment; and, as he is the legal custodian of the records and proceedings of the circuit court, upon the abolition of this county court no formal transfer by means of any certificate from him became at all necessary to the exercise by the circuit court of jurisdiction over any cause theretofore pending in such abolished county court over which the court would by law have jurisdiction in the absence of a county court, but the act abolishing such county court of itself, effected a transfer of jurisdiction.

It is to be noted that the supreme court, in holding as it did,



necessarily recognized that the defendant could be tried in the circuit court on an information which had been originally filed in the county court, without requiring the state to re-file the information.

Although the language appears to be dicta to the holding of the court, the supreme court of Florida in *State ex rel Landis v. Dickenson*, 103 Fla. 907, 138 So. 376, recognized the above-stated rule wherein it stated (138 So. at 379):

But when the legislature by a proper act has abolished the civil court of record of Hillsborough county, the effect is automatically to reinstate the full jurisdiction and powers of the circuit court to proceed with the unexercised jurisdiction and powers formerly committed to the abolished civil court of record. Therefore as a necessary consequence of the abolition of such court, the circuit court requires jurisdiction under the general law to proceed from that time on with the exercise of such constitutional and statutory jurisdiction as may be vested in circuit courts, just as if the civil court of record had never been created at all. The jurisdiction of the circuit court thereupon attaches not only to controversies which were formerly required to be tried by the civil court of record, but to all cases pending in the abolished civil court of record as to which any further judicial proceedings are required to be taken at the time the civil court is abolished.

Similar expressions by the supreme court may be found in cases interpreting rules providing for the transfer of causes when an action at law or in equity has been erroneously begun on the wrong side of the court or when a suit has been improvidently filed in the wrong court. Rule 1.39, 1954 Florida rules of civil procedure, presently provides for such transfers in civil cases. A similar provision existed under old equity rule 75 (Ch. 14658, §75, 1931).

In applying these provisions, the supreme court of Florida has consistently held that the transferring of a cause, whether it be from one side of the court to the other or from one court to another, does not amount to the institution of a new suit. *Frierson v. Frierson*, 110 Fla. 416, 149 So. 18, 19; *Wilbur v. Hampton*, 128 Fla. 256, 174 So. 742; *Deas v. Burnham*, Fla., 1953, 65 So. 2d 297.

Based on the above-stated authorities, it is my opinion that an information originally filed in the criminal court of record in and for Broward county, may be transferred to the newly established court of record without necessitating a re-filing of said information. In making this determination, I am not unmindful of the fact that the language of house bill 1543 does not contain a statement that the new court of record shall proceed to adjudicate cases transferred to it. However, in order to give meaning to the legislative intent that "all cases pending . . . shall be forthwith transferred to the court hereby established," it is my opinion that the cases transferred should proceed thereafter as though they were originally instituted in the court of record in and for Broward county.

Your question is therefore answered in the affirmative.

059-124—June 24, 1959

## TAXATION

SALES AND USE TAXES—PUBLIC WORKS CONTRACTS  
EXECUTED AFTER AUGUST 1, 1959—§212.08, F. S., AS  
AMENDED BY CH. 59-402; §337.11; CHS. 212 AND  
334-339, F. S.; §4, ART. IX, STATE CONST.

To: Ross H. Stanton, Jr., State Road Department, Tallahassee

QUESTION:

Where bids for public works are received and opened by a state agency prior to Aug. 1, 1959, but the contracts thereon are not executed and delivered by the parties until after said Aug. 1, 1959, may the state agency make adjustments in such contracts so as to protect the bidding contractors against the sales and use taxes imposed by Ch. 212, F. S., as amended by Ch. 59-402?

Under §212.08(7), F. S., as amended by said Ch. 59-402, general exemption from the sales and use taxes imposed by Ch. 212, F. S., is granted to the state and its counties, municipalities and political subdivisions, and their agencies, "provided, this exemption shall not include sales of tangible personal property made to contractors, employed either directly or as agents, of any such government or political subdivision thereof *except* public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959 . . ." (Emphasis supplied.) We stated, in our opinion of June 15, 1959 (059-111), that it was our view that "the test for determining if a 'public work is in progress' is whether a governmental unit has entered into a bona fide public works contract on or before August 1, 1959 . . ." and further that, "it is reasonable to assume that if a public construction project has reached the stage where a formal contract has been entered into on or prior to August 1, 1959, it 'is in progress' sufficient for all intents and purposes to satisfy the act." Unless the contracts in question be entered into prior to Aug. 1, 1959, the above stated question must be answered in the negative, unless the contracting state agency be authorized to pay the tax in question from public funds.

Under §337.11, F. S., "whenever a contract is awarded (by the state road department) to the lowest responsible bidder, *no supplemental agreement* exceeding the original limits of the contract shall be executed, and any such supplemental agreement in violation of this section shall be null and void, and no money shall be paid thereon . . ." Sales and use taxes are applicable to purchases made by such contractors, whether for their own account or as agent of the state or a county or their agencies. (§212.08, F. S., as amended by Ch. 59-402). We find nothing in the Florida highway code (Chs. 334-339, F. S.) or in the sales and use taxing statutes (Ch. 212, F. S.), authorizing payment by the state road department, either directly or indirectly, from public funds of sales and use taxes imposed upon public works contractors under contract with the said department. We find no other statute or law appropriating public funds for the payment of such sales and use taxes, within the purview of §4, Art. IX, State Const. The adjustments contemplated by the above question in the public works contracts would appear to be supplemental agreements not contemplated by the parties when the contracts were filed, opened and

acted upon and violative of the Florida highway code and other constitutional and statutory provisions.

The above stated question is, therefore, answered in the negative should the contracts therein mentioned be executed and/or delivered after Aug. 1, 1959.

059-125—June 25, 1959

**CRIMINAL PROCEDURE**  
**TERMINATION OF TEMPORARY AUTHORITY OF COUNTY**  
**SOLICITOR SPECIALLY ASSIGNED UPON RESIGNATION**  
**FROM REGULAR OFFICE**

*To: Charles A. Nugent, Jr., County Solicitor, West Palm Beach*

**QUESTION:**

Does the authority conferred on an acting county solicitor by executive order of the governor of the state assigning him to prosecute certain cases pending in another county in the state remain with said acting county solicitor after he has resigned from his regular position as a qualified county solicitor of his own county? And if the said authority remains with said acting county solicitor after his said resignation, would he be qualified and entitled to represent the state in an appeal taken to the circuit court, which appeal would normally be handled by the state attorney for that circuit?

The fact that a man is a county solicitor is the jurisdictional fact which gives the governor the power to assign him to prosecute in the criminal court of record of another county. If he were not county solicitor, the governor would have no power to assign him to another county. It follows that the governor's assignment automatically comes to an end by operation of law when the assigned county solicitor ceases to be the county solicitor of his home county, and that he cannot thereafter act under such assignment.

Therefore, after a county solicitor's resignation becomes effective, any services rendered by him in cases pending in the criminal court of record of the county to which he was assigned prior to the effective date of his resignation, as well as any services thereafter rendered by him in appeals taken in such cases, must be rendered as a private attorney and not as an assigned county solicitor.

059-126—June 26, 1959

**INSURANCE**  
**GROUP PERMANENT LIFE INSURANCE—LIMITS OF**  
**COVERAGE—§635.24(5), F. S.**

*To: J. Edwin Larson, Insurance Commissioner, Tallahassee*

**QUESTION:**

May a policy of group life insurance issued to an employer, or to a labor union or to trustees of a fund established by an employer or labor union, provide permanent life insurance in excess of \$20,000 per person? Section 635.24(5), F. S. provides:

(5) No such policy of group life insurance may be

issued to an employer, or to a labor union, or to the trustees of a fund established in whole or in part by an employer or a labor union, which provides term insurance on any person which together with any other term insurance under any group life insurance policy or policies issued to any employer or employers of such person or to any labor union or labor unions of which such person is a member or to the trustees of any fund or funds established in whole or in part by such employer or employers or such labor union or labor unions, exceeds twenty thousand dollars, unless one hundred and fifty per cent of the annual compensation of such person from such employer or employers exceeds twenty thousand dollars, in which event all such term insurance shall not exceed forty thousand dollars or one hundred and fifty per cent of such annual compensation, whichever is the lesser.

Section 635.24(5), F. S., by its express language applies only to term insurance and does not apply to permanent insurance. There is no other statutory provision which limits the amount of coverage under an employer or labor union group policy. Accordingly, your question is answered in the affirmative. This conclusion will apply under the new insurance code as the new code retains substantially without change the group life provisions of the present law.

059-127—June 26, 1959

#### CRIMINAL PROCEDURE

#### TRANSFER OF INFORMATION FILED IN ABOLISHED CRIMINAL COURT OF RECORD TO NEW COURT OF RECORD IN BROWARD COUNTY—FEES OF CLERK OF NEW COURT—CH. 59-877; \$939.01, F. S.

To: *Emerson Allsworth, Attorney, Criminal Court of Record,  
Ft. Lauderdale*

#### QUESTIONS:

1. May an information originally filed in the criminal court of record in and for Broward county, be transferred to the newly established court of record in and for Broward county, without necessitating a re-filing of said information?

2. If the above question is answered in the negative, is the clerk of the new court entitled to his fees on all cases re-filed?

3. If the answer to question 1 is in the affirmative, is the clerk of the new court entitled to fees for handling such cases as are transferred?

In a recent opinion, 059-123, which I rendered to Mr. Thomas M. Coker, county solicitor for Broward county, question 1 was answered in the affirmative. Said opinion will therefore answer the above stated question.

In view of my opinion that it is not necessary for the information to be re-filed, question 2 becomes moot.

A reading of house bill 1543, which created said court of record, discloses that the clerk of said court is entitled to \$7.00 for each defendant in each criminal case, said amount to be paid by the board of county commissioners of Broward county. It will be assumed for



the purposes of my opinion that the said board paid a similar fee upon the institution of each case in the criminal court of record, prior to its transfer to the court of record.

In view of my answer to question 1 that it was not the intent of the legislature that these cases be treated as new suits, I fail to find anything in the bill which would warrant the conclusion that said board is required to pay an additional fee upon the transfer of the cause to the court of record.

Moreover, it is my opinion that an interpretation requiring the said board to pay in behalf of the party litigant, the State of Florida, an additional fee in the court of record would amount to the deprivation of a vested right which accrued to the state at the time the county solicitor filed the original information and said board paid the filing fee thereon, to-wit: the right to try and prosecute the defendant without the necessity of paying an additional filing fee. In *Board of Commissioners, etc. v. Forbes Pioneer Boat Line*, 80 Fla. 252, 86 So. 199, the supreme court of Florida, in discussing such retrospective legislation, stated (86 So. 202):

The chief restriction upon this class of legislation is that vested rights must not be disturbed, but in its application as a shield or protection the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice.

In *McCord v. Smith*, Fla., 1950, 43 So. 2d 704, the supreme court also stated (43 So. 2d 708-709):

A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated. See 50 Am. Jur., Sec. 482, pages 505, 506.

It is true that the state may constitutionally pass retrospective laws waiving or impairing its own rights, or those of its subdivisions or instrumentalities. However, no provision is made in house bill 1543 differentiating between the transfer of criminal cases to the new court of record and the transfer of civil cases to that court. Said bill also provides for the transfer of civil cases from the circuit court and county court to the new court of record, and makes similar provision for fees for the clerk of the court of record in civil cases. In order for the bill to be constitutional, I think that it must be construed as not requiring additional fees to be paid by plaintiffs in civil cases when their cases are transferred to the court of record; in other words, it is my opinion that it must be construed so as to protect their vested rights to have the services performed which they have already paid for in the courts from which their cases are transferred. Since the bill must be thusly construed as to civil litigants, and since its similar provisions as to criminal cases fall far short of clearly expressing a legislative intent that the board of county commissioners must pay twice for the same services in criminal cases, that is to say, once to the clerk of the criminal court of record and once to the clerk of the court of record, I think that the clerk of the court of record is not entitled to be paid a fee in a

criminal case transferred from the criminal court of record.

Another factor which leads to my conclusion is that the rights of defendants in criminal cases would be unfairly prejudiced by a contrary holding. Section 939.01, F. S., requires that in all cases of conviction for crime, the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person. If an additional fee were required to be paid to the clerk of the court of record in every case transferred to said court, such additional fee would be a part of the cost of prosecution, as would be the fee paid to the clerk of the criminal court of record before the transfer, and §939.01 would require that both fees be included in the judgment rendered against a defendant who is convicted in the court of record after his case has been transferred from the criminal court of record. This would amount to a double taxation of costs against such a defendant, since the fee paid to the clerk of the criminal court of record before the transfer was for all clerical services to be performed in the case until its final conclusion. I do not believe that such a double taxation of costs would be either just or lawful.

Therefore, it is my opinion that the clerk of the newly established court of record cannot lawfully charge an additional fee for a case transferred to it from the criminal court of record of Broward county; and that question 3 must be answered in the negative.

059-128—June 26, 1959

### CRIMES

#### GAMBLING, LOTTERY, ELEMENTS

To: *Paul B. Johnson, County Solicitor, Hillsborough County, Tampa*

#### QUESTION:

Would the following statement of facts be violative of the laws of Florida prohibiting lotteries?

One or more cars, distinctively marked with the Colonial Sugars emblem, will, on several days each week, call on housewives. The names of these housewives will be chosen out of the telephone directory at random by some third disinterested person. If the housewife, when called to the door is able to exhibit a package of Colonial Sugars she will be asked to record a brief statement of endorsement of the product for which she will receive \$25. If the lady does not have a package of Colonial Sugar, the houses to the immediate right and left of the address will be called on.

As you know, a lottery contains three elements, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

It would appear that the element of prize is present in the scheme, to-wit: the offering of something of value.

It would further appear that there is consideration in the scheme when compared with the reasoning of the Florida Supreme Court in the case of *Little River Theater Corp. v. State*, 135 Fla. 854, 185 So. 855, to-wit: the necessity for the individual to purchase a package of Colonial Sugars before she can participate.

However, I cannot be quite so definite with respect to the remaining element, "an award by chance." Under the various

decisions, there can be no lottery unless chance predominates in the final determination of whether or not the prize is awarded.

An unequivocal answer to your query is therefore difficult in the absence of more specific knowledge of what use is to be made of the endorsements after they are secured.

Your summary states that the company will give \$25 to each participant in return for her endorsement of its product. If the company secures these endorsements without any intention of ever using them, then it would be apparent that the endorsement would be a mere subterfuge and the award would be based entirely on the element of chance, to-wit: the random selection of names from the telephone directory. The actual failure to make use of any of the endorsements would be a factor to consider in determining the intent of the company.

However, if the company intends to make use of the names in the advertising of its product or for other business purposes; and, a fortiori, if the company does in fact make use of these endorsements, it is my opinion that such a scheme would not constitute a mere subterfuge and the element of chance would not predominate.

In the modern advertising field, it has been the common practice of industry to secure endorsements of products to be used in advertising them and a great deal of money is expended each year for this purpose. The fact that a prominent individual would not be the person endorsing the product under the instant plan should not be a determining factor in concluding whether or not this constitutes an award by chance.

Although it is to be realized that the individuals who give the endorsements would be selected at random from the telephone directory, in return for the \$25, they have contracted away their right to privacy, that being the use of their names in any reasonable manner that the company sees fit to use them.

059-129—June 29, 1959

#### INSURANCE

GROUP INSURANCE — ELECTRICAL WORKERS UNION,  
MIAMI—§635.24(3) (a), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

#### QUESTION:

May a group life insurance policy issued to a labor union include in its coverage the administrative personnel of the union who are not union members?

Section 635.24(3) (a), F. S., pertaining to group life insurance for labor unions, provides:

The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment or to membership, in the union, or both. In the case of a policy issued to the trustees of a fund established in this state by a labor union, the policy may provide that the trustees or their employees, or both, may be insured under the policy if their duties are principally connected with such trusteeship. (Emphasis supplied.)

If the group life insurance policy is issued to the trustees of the union welfare fund, the employees of the trustees may be in-

sured under the group policy if their duties are principally connected with the trusteeship. Thus, any administrative personnel of the union whose duties are principally connected with the welfare fund would be eligible for coverage under the group policy, but other administrative personnel of the union would not be eligible for coverage unless they were union members. This conclusion will apply under the new insurance code since the group life provisions of the present law are substantially unchanged in the new code.

059-130—June 30, 1959

# COURTS

## JUVENILE COURT—EXCLUSIVE ORIGINAL JURISDICTION OF DELINQUENT JUVENILES OF SIXTEEN YEARS OF AGE—§§39.01(6), (11), 39.02(6) and 39.06(6), F. S.

To: *Gordon G. Oldham, Jr., State Attorney, Leesburg*

### QUESTIONS:

1. Where an information has been filed in the circuit court against a juvenile of the age of 16 years prior to the filing of a petition against such juvenile in the juvenile court, should the case be referred to the juvenile court? Or, has the filing of the information deprived the juvenile court of jurisdiction?

2. Does the state attorney have the right to file an information against a juvenile when he thinks it necessary to do so, without regard to whether or not the juvenile court has taken action?

A child of the age of 16 years who commits a violation of law is a delinquent child. (§39.01(6),(11), F. S.)

The juvenile court has exclusive original jurisdiction of delinquent children (§39.02(1)) and all proceedings against a child for alleged violation of law must be brought in the juvenile court except as provided in §39.02(6).

Under the circumstances specified in §39.02(6), said subsection permits, and in certain situations requires, a juvenile court to waive jurisdiction and certify a case to the court which would have jurisdiction if the child were an adult.

Section 39.06(6) specifies when the jurisdiction of the juvenile court actually attaches to a child and case, and it appearing from your letter that no petition was filed in the juvenile court, I shall assume that that court never acquired jurisdiction of the child and the case.

Nevertheless, under the above cited statutory provisions no other court can acquire jurisdiction to try a 16-year-old person on a criminal charge until the jurisdiction of the juvenile court has attached and it has waived jurisdiction and transferred the case pursuant to §39.02(6).

It follows that the filing of the information in the circuit court did not operate to waive the juvenile court's jurisdiction and did not deprive it of jurisdiction; that the only way the circuit court can acquire jurisdiction is for the jurisdiction of the juvenile court to attach in accordance with §39.06(6) and for that court to thereafter waive jurisdiction and transfer the case to the circuit court in accordance with §39.02(6); and that the state attorney is not authorized to file an information prior to such waiver and transfer.



If the juvenile in question was presumed to be an adult when the information was filed against him in the circuit court, within the contemplation of §39.02(3), then the circuit court may transfer the case and the child to the juvenile court as authorized by said subsection; otherwise, the juvenile court's jurisdiction can attach only in the manner specified by §39.06.

059-131—June 29, 1959

#### STATE FINANCES

ITEM 32, §1, CH. 59-500, LUMP SUM APPROPRIATION FOR INTERIM LEGISLATIVE EXPENSES—APPLICATION OF §§13-15, CH. 59-500 (§282.01(13)-(15)), LIMITING EXPENDITURE OF MONEYS APPROPRIATED—§§11.19, 11.20, 11.25 (2), F. S.

To: *Harry G. Smith, Budget Director, Tallahassee*

#### QUESTION:

Are the provisions of §§13, 14 and 15, Ch. 59-500, applicable to the legislative reference bureau and others for whom appropriations are made by item 32, §1 of said Ch. 59-500?

Item 32, §1, Ch. 59-500, the general appropriations act of 1959, appropriates a lump sum "to be used for legislative expenses during and between sessions of the legislature as provided by law and for the expenses of the offices of the clerk of the house of representatives and the secretary of the senate or the sergeants' offices and duties as provided by law or rules of the house and senate, and includes three hundred thousand dollars for the biennium for use of the Legislative Council and Reference Bureau for the purposes as authorized in chapter 11, Florida Statutes. The necessary and regular expenses of interim committees created by acts of the legislature shall be paid from this appropriation. Members of interim committees authorized by law or concurrent resolutions of either branch of the legislature shall be paid per diem and mileage . . . ." There is no division of said item 32 into "salaries," "expenses," "operating capital outlay" or otherwise as is made in most of the other items in the general appropriations act. Section 13 of said appropriations act provides that "it is the intent of the legislature that the sums appropriated herein or in any other act shall be expended only for the purpose for which appropriated," then follows certain limitations upon the use of funds specifically appropriated for "expenses," and otherwise to purposes other than that specifically mentioned.

There being no division of the appropriation for "legislative expense" into items for "expenses," "salaries," "operating capital," etc., the above mentioned limitations have little if any application. The first sentence of said §13 limits the use of funds appropriated by said item 32 to "legislative expenses" and to no other. The 5% limitation upon salary increases, also contained in said §13, appears to be based upon the "rate for such positions as contained in the legislative budget request submitted to the 1959 session of the legislature." It is declared, by §14 of the said act, to have been the "intent of the legislature that no department or branch of state government may exceed the number of employees allowed by the legislature when arriving at the amounts

appropriated for salaries, unless specifically authorized by the legislature. . . ." The appropriation made by said item 32, being a lump sum appropriation, is not divided into sub-items for salaries, expenses, etc., as other items are; it is, therefore, doubted that the legislature considered the number of legislative employees "when arriving at the amounts appropriated for salaries," etc., by item 32 aforesaid. It is also doubted that §15 has any application, unless the legislature or some agency of it filed a budget within the purview of said section. We are advised of no such budget having been filed for the legislative department or any of its agencies, such as the legislative reference bureau. The budget commission's report to the 1959 regular session of the legislature reflects no such detailed report.

In §11.25(2), F. S., the legislature has declared and determined "that the legislative council has been and shall continue to be a committee of the legislature with interim powers *and not an agency of the government* . . . and that no power shall rest in the budget commission to release or withhold funds appropriated to the legislative council in the general appropriations act or other acts of the legislature, but same shall be available for expenditure as provided by law and the rules or decisions of the legislative council." It further appears from said §11.25 that the "legislative reference bureau has been and shall continue to be a group of employees selected by the legislative council, as provided by law, employed by the legislature and the legislative council to perform such services as may be provided by law or directed by the legislative council and is not an agency of the government . . . and the state budget commission had and shall have no power to determine the number or fix the compensation of such employees or exercise any manner of control over such employees . . ."

The legislative reference bureau was created and established "for the use of the members of the legislature" (§11.19, F. S.) for the purposes mentioned in §11.20 of said statutes. "The general administration and responsibility for the proper operation of the reference bureau" are in the hands of the legislative council which bureau is composed of the presiding officers of each house and eight members from each house to be appointed by the said presiding officers.

We are, therefore, of the opinion, in the absence of a specific showing of something specifically bringing the legislative reference bureau within the purview of said §§13, 14 and 15, or either of them, that the above stated question should be answered in the negative.

059-133—July 3, 1959

#### HIGHWAYS, BRIDGES AND FERRIES

#### DEDICATION AND ACCEPTANCE OF COUNTY ROADS—

§§125.01, 177.10, 336.01, 336.02, 336.08, 861.11, F. S.;

§42, CHS. 29965, 1955, 57-776

To: William D. Barrow, County Attorney, Okaloosa County, Crestview

#### QUESTION:

What steps are necessary for the board of county commissioners of Okaloosa county to validly accept a dedication of certain roads indicated on a subdivision plat as county roads?

Our previous correspondence in this matter indicates that the board wishes to assist a private contractor in the construction of the roads in a subdivision now being developed by him. By my letter of March 3, 1959, I advised you that while the board could not legally use county equipment to assist in the construction of *private roads*, they could validly accept a dedication of the roads in the subdivision as county public roads and thus could assist in the construction of the roads so dedicated and accepted.

The term "public road" is applied to all kinds of public ways open to the public for passage. The character of a road, as to whether it is public or private, is determined by the extent of the right to use it rather than by the extent to which the right is exercised. If the public has the right to use a road, it is a "public road." 16 Fla. Jur. (Highways, §2) p. 10.

The *county road system* consists of all public roads outside of municipalities, not included in the state highway system or the state park roads system, and certain designated municipal connecting links (§336.01, F. S.). The county road system does not necessarily include subdivision streets although it may be that the board of county commissioners, at the time of dedication or thereafter, may provide by appropriate procedure that a certain street or streets in a subdivision be included as a part or extension of the county road system. When adding new roads to the public road system, it is necessary that there be a valid determination of the above defined "public purpose" by the appropriate governmental body. In this instance, the board of county commissioners of Okaloosa county must make a determination as to which of the roads in the subdivision will constitute a valid *extension* of the county road system. Only those roads in the subdivision which, in the judgment of the board, serve a county purpose, as distinguished from a private purpose, should be accepted as county roads.

The mere approval of a subdivision plat for record does not constitute a valid determination that the roads dedicated in that plat do, in fact, serve a county purpose. Nor does such approval constitute a valid acceptance of dedication as expressed by the plat. All subdivision plats are required to be properly dedicated, approved and recorded in the public records of the county. Section 177.10, F. S., provides:

*Certificate of approval to be placed on map or plat.—*

Before said map or plat shall be presented to the county clerk for record, the owner or owners shall cause to be placed thereon a certificate of approval by the county commissioners, town board, or council, or the board of commissioners (in municipalities having a commission form of government) or their accredited representatives, having jurisdiction over the land described in the said map or plat; *however, such approval shall not bind the county commissioners, town board, city council or board of commissioners to open up and keep in repair any parcels dedicated to the public in any map or plat so offered, but they may exercise such right at any time.* (Emphasis supplied.)

Section 336.08, F. S., provides that the board of county commissioners may *establish, locate, change or discontinue public county roads by resolution*. In addition to the approval of the plat required by §177.10 *supra*, it is my opinion that the board of county commissioners must also affirmatively accept, by resolution reflected in its minutes, the dedication of all roads which are to be

come a part of the county road system.

It also appears that the board of county commissioners may prescribe minimum standards of construction for such roads as a condition to their acceptance (A. G. O. 057-292 p. 357.) The board of county commissioners has plenary power to construct, establish and maintain county roads (§125.01 (1), F. S.; *Webb v. Hillsborough County*, 128 Fla. 471, 175 So. 874 (1937)). Further amplification is contained in §336.02, F. S., as follows:

*Responsibility for county road system.*—The county commissioners are invested with the general superintendence and control of the county roads and structures within their respective counties, and *may establish new roads, change and discontinue old roads, and keep the same in good repair in the manner herein provided. They shall be responsible for establishing the width and grade of such roads and structures in their respective counties.* (Emphasis supplied.)

In A. G. O. 055-299, p. 388, I dealt with Ch. 29965, 1955. Section 42 of that act, the predecessor of the above quoted section, provided that all county roads must have at least a 66 foot right-of-way. This exact figure was removed by a 1957 amendment and the board of county commissioners now has absolute discretion in establishing the width and grade of county roads (Ch. 57-776, see also §861.11, F. S.). Under the above quoted authorities the board of county commissioners is given the power to establish reasonable minimum standards of construction for all roads in the county road system, whether initially built by the county or by private contractors.

059-134—July 3, 1959

#### COURTS

#### JUVENILE COURTS—DISCLOSURE OF PRIVILEGED INFORMATION—§39.12(2),(3),(4), F. S.

To: *Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando*

#### QUESTION:

**Is it lawful to reveal the information from the file of a juvenile to a representative of the armed forces of the United States?**

Section 39.12, (2), (3) and (4), F. S., provides, among other things:

(2) . . . the judge of each juvenile court shall keep a record to be designated "juvenile court statistical card" as to each child on whom a petition has been filed in the court, setting forth full statistical data concerning such child and the grounds for the proceedings involved. . . . Said card shall on or before the tenth day of each month be delivered to the department of public welfare of this state and shall be used by said department only for the purpose of obtaining the statistical information and shall be returned without undue delay to the juvenile court when such information is obtained. Such cards shall not be public records and shall be confidential information while in the possession of said department, and said department shall not take or retain any names or addresses



from any such cards or other information that would identify a child; nor shall such department release or publish any statistical data of a particular county or group of counties except it may publish the combined or integrated statistical data so obtained as to all counties reporting under this law. *Said department and any juvenile judge shall permit duly authorized representatives of other state departments to inspect and make abstracts necessary for compilation of statistics in relation to child dependency and delinquency in this state. (Emphasis supplied.)*

(3) Juvenile court records shall not be public records, and shall not be open to inspection by the public. *Records shall be inspected only upon order of the judge, by persons deemed by the judge to have a proper interest therein, . . . The judge may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the judge may deem proper, and may punish by contempt proceedings any violation of those conditions. (Emphasis supplied.)*

(4) All information obtained in discharge of official duty by any judge, counselor, assistant counselor, or employee of any juvenile court shall be privileged, and shall not be disclosed to anyone other than the authorized personnel of the juvenile court and others entitled under this chapter to receive that information, **EXCEPT UPON ORDER OF THE JUDGE.** (Emphasis supplied.)

In view of the foregoing, it is my opinion that it lies with the discretion of the judge of the juvenile court to allow a bona fide representative of the United States to inspect and make abstracts from the official records pertaining to a juvenile under whatever conditions upon their use and disposition the judge may deem proper.

Your question is answered accordingly.

059-135—July 3, 1959

#### ZONING LEGISLATION

#### EFFECT OF FAILURE TO APPOINT APPEAL BOARD ON IMPLEMENTATION OF LEGISLATION—CH. 57-1486

To: J. E. French, Chairman Lake County Zoning Commission, Lady Lake

#### QUESTION:

May any of the provisions of Ch. 57-1486 relating to zoning in Lake county be implemented prior to the appointment of board of adjustment under provision of §7 of said chapter?

Chapter 57-1486 is an act providing for county-wide zoning. Under the procedure outlined in §6 of the act the board of county commissioners is authorized to appoint a zoning commission consisting of two qualified electors from each county commissioner's district. The function of the zoning commission is to hold public hearings and make a report to the board of county commissioners wherein the boundaries of the original zoning districts are defined. Upon receipt of the zoning commission's report the county

commissioners may hold further public hearings and adopt or reject the report of the zoning commission.

Under the provisions of §7 of the act any person aggrieved by the acts of the commission may appeal the administrative zoning decision to a board of adjustment, a quasi judicial body, consisting of five qualified electors of the county to be appointed by the governor.

The board of adjustment is authorized to adopt rules of procedure and in appropriate cases make special exceptions and variances to zoning resolutions and orders. Appeals shall be taken within a reasonable time and shall stay proceedings in furtherance of the action appealed from.

The question now presented to this office is whether or not any of the provisions of this act may be implemented prior to the time the governor is notified to appoint a county board of adjustment as provided for in §7 of the act.

Chapter 57-1486, by its own terms, became effective upon becoming law (June 29, 1957) and the board of county commissioners was then authorized to put the provisions of the act in effect when it saw fit to do so. For the purposes of this opinion the constitutional validity of the act in question is assumed.

Section 7 of the act provides in part:

Whenever said board of county commissioners shall have determined to exercise the powers conferred by this act, *it shall notify the governor of such determination and it shall thereupon become the duty of the governor to appoint a county board of adjustment for said county, . . .* (Emphasis supplied.)

It has been held in some cases that the failure to provide an appeal board, such as the board of adjustment mentioned in §7 quoted above, has rendered zoning ordinances invalid. On the other hand, it has also been stated that "A zoning ordinance, however, will not be invalidated because an appeal board required by the enabling act was not created by the ordinance, *where the board was legally created and its members legally appointed before the adoption of the ordinance.*" (Emphasis supplied.) (101 C. J. S. 749, Zoning, §41; 58 Am. Jur. 1045, Zoning, §194).

It has been said that "zoning ordinances should be liberally construed to accomplish their plan, purpose and intent" (117 A. L. R. 1117).

In the instant case the primary concern is to preserve the preliminary procedures and determinations but at the same time insuring that the requirements of due process are fully met. This being the case it appears to this office, in the light of the judicial authorities cited above, that any zoning resolutions or orders heretofore adopted or made by the board of county commissioners pursuant to recommendations and reports of the zoning commission and public hearings held shall not be considered as having full force and effect until the date upon which the governor appoints the board of adjustment. Nor should the board of county commissioners proceed to enforce said zoning resolutions or orders until the reasonable time for appeal fixed by the board of adjustment has elapsed. In other words, we do not believe all of the preliminary procedures heretofore taken by the county commission and its zoning commission are void merely because the board of adjustment has not been appointed. However, we do believe the enforceable effects of the zoning resolutions or orders should stand suspended until the

board of adjustment has been appointed and opportunity to appeal to it has been afforded to any one aggrieved by these zoning resolutions or orders.

059-137—July 9, 1959

### TAXATION

#### LICENSE TAXES—TAXICABS AS “PLACES OF BUSINESS”—§205.53, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Where occupational licenses are imposed upon the owner of two or more motor vehicles used as taxicabs, should each taxicab be considered as a “place of business” in determining the amount of occupational license tax to be charged said owner?

2. Where several persons drive and own their own taxicabs but join together into a cooperative or similar group for purposes of facilitating their individual businesses, are such persons to be regarded as owning separate “places of business”?

Section 205.53, F. S., provides in part that “every person engaged in any business, as owner, agent or otherwise, that performs some service for the public in return for a consideration, *shall for each place of business* pay a license tax of three dollars, plus an additional amount equal to two dollars for each person *in excess of one employed or working thereat.*” (Emphasis supplied.) It would appear that the operation of a taxicab would be a “business . . . that performs some service for the public in return for a consideration,” namely, transporting passengers to and from various points in return for a monetary remuneration, and is engaged in a public service within the definition of §205.53, *supra*. Said section concludes with the limitation that “no tax under the provisions of this section shall exceed fifty dollars.”

“A ‘place of business’ is simply a location where business is transacted or, as it is defined in Oxford English Dictionary, ‘a shop office, warehouse, commercial establishment.’” (McCall v. State, 156 Fla. 437, 23 So. 2d 492, text 494). This definition of “place of business” as well as others given in 32A Words and Phrases, p. 140, et seq., clearly indicates that the term, though inanimate, generally connotes a fixed or stationary location where business is conducted. “The word ‘taxicab’ has a well-known and definite meaning. (Taxicabs are) vehicles which operate from a fixed station at which the drivers receive passengers or receive telephone calls directing them where the passengers will be found, and which drive to the destination of their passengers . . .” (Frick v. City of Gary, 192 Ind. 76, 135 N. E. 346, text 347). Accordingly, we doubt that a taxicab, moving from place to place while picking up and discharging passengers and motivated primarily by the verbal instructions of the radio operator at the central office, or “call” office, of a taxicab company, could be considered as a “place of business.” The individual taxicabs are more in the nature of “agents” of the principal entity which relays orders to pick up passengers and the like. While recognizing that an individual taxicab should not, for purposes of §205.53, *supra*, be considered a “place of business” where said taxicabs are dispatched from a central office and are

either owned or franchised by that office, said taxicabs taking advantage of receiving their calls from one central point, group insurance, reduced advertising costs and similar business advantages, we do not negative the possibility that in some instances and under certain circumstances a taxicab might be considered as a "place of business." We are, therefore, of the opinion that the "license tax of three dollars" imposed by §205.53, *supra*, should be levied upon every person engaged in "the taxicab business," as owner, agent or otherwise, regardless of the number of taxicabs which he might be operating and regardless of whether the cabs are legally owned by him or are operated and owned by the drivers or other individuals and franchised by the entity advertising the use of the cabs and relaying messages to the individual cabs from the central or "call" office. (See *Meridian Taxicab Co. v. Ward*, 184 Miss. 499, 186 So. 636, 120 A. L. R. 1346, holding that a company "was engaged in what is commonly known as the taxicab business, that is, transporting passengers for hire" where other persons owned and operated the taxicabs but the company had a central office where it relayed messages to each individual taxicab requesting passenger service, advertised the trade name used by all the taxicabs, and maintained a central point where all cabs were required to be serviced.) We do not think that each individual taxicab should be considered a "place of business."

The additional tax imposed by §205.53, *supra*, "equal to two dollars for each person in excess of one employed or working" at each place of business of the taxicab business should be based upon the number of persons in excess of one who works in or operates from or out of the principal office, or "place of business," taking into consideration the number of taxicab drivers employed, as well as other additional employees used for other purposes in and around the central or call office.

Oftentimes, persons owning and operating their own vehicles as taxicabs will associate themselves in a cooperative arrangement whereby they agree to share the expense of operating a central control whereby passengers will call that point to order the services of a taxicab. The call will then be relayed to the individual cab by means of a radio placed inside the taxicab for this purpose. The central office is largely a dispatching office in addition to securing insurance coverage for the taxicab owners and their vehicles and usually does the advertising for the group under a common name. Many times passengers will come to the central office to wait for a taxicab to "check in" and pick up passengers. Although there may be some distinction between this type of arrangement and the situation where the company owns and operates the taxicabs through hired drivers, we think the distinction immaterial in so far as the purposes of this opinion are concerned and feel that the "place of business" of such a cooperative group would be the central office thereof rather than classifying each individual taxicab as a "place of business." Accordingly, the same rules of construction as applied, *supra*, to the license taxation of taxicab companies should also apply to a cooperative association of individual taxicab operators.

The above observations appear to answer your question in the negative. However, this opinion should be confined to the specific questions presented and does not extend to "one-man" operations whereby a person owns and operates a taxicab on a part-time basis or where a taxicab is operated independently of a central office.



059-138—July 10, 1959

**REGULATION OF TRADE AND COMMERCE  
TRADING STAMPS—APPLICATION OF CH. 59-311 (PART I,  
CH. 559, F. S.) TO PLAN TO GIVE TRADING STAMPS  
OR COUPONS REDEEMABLE BY RETAILER**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

Are coupons issued to retail customers in return for cash payment of merchandise, or payment by the 10th day of the month following the month in which the purchase is made, where said coupons are redeemed by the retailer himself either in cash, merchandise or services, within the provisions of Ch. 59-311, regulating the distribution, issuance and redemption of trading stamps in this state?

Chapter 59-311 purports to regulate the distribution, issuance and redemption of trading stamps in this state. By the terms of subsection (a), section (1) thereof, a "trading stamp" is defined as "any stamp or similar device issued in connection with the retail sale of merchandise or service, as a cash discount or for any other marketing purpose, which entitles the rightful holder, on its due presentation for redemption, to receive merchandise, service or cash." (Emphasis supplied.) "Any redeemable device used by the manufacturer or packer of an article, in advertising it or selling it, or any redeemable device issued and redeemed by a newspaper, magazine or other publication" is expressly excluded from said chapter.

A "trading stamp company" is defined as "any person (individual, partnership, corporation, association or other organization) engaged in distributing trading stamps for retail issuance by others, or in redeeming trading stamps for retailers, in any way or under any guise." (Emphasis supplied.) Although there are numerous regulations and restrictions placed upon the operations of trading stamps companies within this state, unless "trading stamps" as defined above, are issued, distributed or redeemed by "trading stamp companies," as defined, supra, there is apparently no restriction upon the issuance, distribution or redemption of such stamps. In other words, it seems that a company, individual, etc., which is not within the definition of "trading stamp company," supra, may issue trading stamps and be without the regulatory provisions of Ch. 59-311.

It appears from the file presented us with request for opinion that a retailer doing business within this state has a "coupon plan" whereby a customer is given one coupon by said company for each one dollar of merchandise purchased, provided that said merchandise is paid for either at the time of the sale or by the 10th of the month next preceding the month of sale. The retailer issues and distributes the stamps in addition to actually selling the merchandise. Each customer may place his coupons on a card provided by the retailer; when a card is filled with the requisite number of coupons, the customer may bring the card to the office of the company, where a seal on the face of the card is broken and a prize given to the holder of the card, depending upon what prize is designated by a number or other identification contained under the seal. Although the prizes which may be awarded include various denominations of cash, as well as merchandise and services to be

performed by the retailer, every person presenting such a card filled with the retailer's coupons is guaranteed to receive a prize.

Although the coupons issued by the retailer would possibly come within the definition of "trading stamps," *supra*, it appears that the definition of a "trading stamp company" does not include a company or other organization or proprietorship engaged in retail selling which issues premium stamps or coupons redeemable only by said company. Said company is not "distributing trading stamps for retail issuance *by others*," nor is it engaged in "redeeming trading stamps *for retailers*." (Emphasis supplied.) It appears from an examination of Ch. 59-311, *supra*, that said chapter was enacted primarily to insure persons buying trading stamps from trading stamp companies doing business within this state that there would be sufficient funds with which to redeem all stamps issued by said company. In order for said chapter to apply it is apparent that the company or other entity engaged in distributing trading stamps must (1) distribute the stamps so that they may be issued "by others"; or, (2) redeem such stamps "for retailers." The chapter would have no application to an entity engaged in retail selling issuing and later redeeming its own stamps, even though such stamps would, under the definition of subsection (a), section (1) thereof, be considered "trading stamps."

We, therefore, answer your question in the negative, subject to the above observations. However, a retailer or other person engaging in a "coupon plan" as described in the file handed us with the request, should consult local law enforcement officials to determine whether the particular scheme may constitute a violation of the lottery or gambling laws of this state.

059-139—July 10, 1959

#### STATE FINANCE

#### CONSTRUCTION OF "COMMON LABOR" AS USED IN §13(a) OF CH. 59-500, 1959 GENERAL APPROPRIATIONS ACT— CONTRACT SERVICES

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. What is embraced in the term "common labor" as used in §13(a), of the 1959 general appropriations act or Ch. 59-500, F. S.?

2. When may a state officer, board, commission or agency enter into contracts for the performance of services on other than a salary basis when payment is to be made from funds made available by the said general appropriations act of 1959?

It is provided in §13(a), Ch. 59-500, the general appropriations act of 1959, that "common labor employed on a day-to-day basis at a per day or per hour rate may be construed as coming within expenses and not salaries for the purposes of this section . . . ." This subsection, in so far as here material, provides that "it is the intent of the legislature that the sums appropriated herein, or in any other act, shall be expended only for the purposes for which appropriated . . . ." For many years like or similar provisions in general appropriations acts provided "*day labor* may be construed as coming within expenses" (§13, Ch. 22827, 1945; §13, Ch. 23915, 1947; §14, Ch. 25370, 1949; §19, Ch. 26859, 1951; §18, Ch. 28115

and §11, Ch. 28231, 1953; §8, Ch. 29966, 1955). Section 9, Ch. 57-424, provided that "casual labor employed on a day-to-day basis at a per day or per hour rate may be construed as coming within expenses," for the purpose of that appropriations act. As shown above the 1959 general appropriations act uses the term "common labor."

It, therefore, appears that the terms "day labor," "casual labor," and "common labor," have been used by the legislature in like and similar provisions of the general appropriations acts of recent years. We find no specific definitions of these terms in the appropriations acts wherein used. Generally in the 1959 appropriations act, as well as like acts for several years last past, appropriations are divided, especially from the general revenue fund, into "salaries," "expenses," and "operating capital outlay." As to some of the agencies under the jurisdiction of the board of commissioners of state institutions there is another item designated "food products." Section 216.02, F. S., requires of state officers, agents, boards and commissions "an estimate in itemized form showing the amount needed for operational expenditures for the next two years . . ." on forms to "be prescribed by the budget director," designating the information to be given thereon. It must be presumed that the reports of such officers, agents, boards and commissions, contained in the "report to the legislature," filed biennially with the legislature by the budget commission of the state are in compliance with this statutory requirement and that the items therein referred to as "salaries," "expenses," "operating capital outlay," etc., are in compliance with the requirements of said §216.02, F. S., and form of reports adopted by the budget director in conformity therewith. These reports were referred to in *State v. Lee*, 140 Fla. 380, 191 So. 697, and *State v. Lee*, 144 Fla. 164, 197 So. 681, for the purpose of construing the general appropriations act or acts there involved. This seems to suggest that reference should be made to the said reports to the legislature for the purpose of construing the general appropriations acts, especially where there is doubt as to whether funds for an alleged purpose were classified as expenses, salaries, or otherwise.

"Day laborer" has been defined as "one who performs day labor or performs labor by the day; one whose engagement to labor is but a day long. At the end of each day, both he and his employer are free . . . . As denoting kind of labor performed, one performing ordinary manual labor; one whose duties demand only the performance of unskilled, manual labor." (see 25 C. J. S. 1008). To the same effect see also Webster's dictionary. "Common laborer" seems to refer to persons laboring with their hands, as distinguished from those performing skilled or mental services. It relates to those who possess no special trade, skill or previous training. (See 15 C. J. S. 591; *Beakley v. Lind*, Tex., 32 S. W. 2d 671, text 672; Webster's dictionary). There seems to be little distinction between the services and duties of "day laborers" or "common laborers" as used in the above mentioned general appropriations acts. In *Lail v. Bishop*, 70 Idaho 284, 216 P. 2d 955, text 956, it is stated that employment is casual "where such employment is uncertain, occasional, at irregular intervals, without regularity, and for a limited or temporary purpose." See also 99 C. J. S. 285, §69; Annotation in 33 A. L. R. 1452, et seq. We feel that the use of the terms "day laborer," "casual laborer," and "common laborer," as used in recent general appropriations acts by the legislature referred to sub-

stantially the same class of persons for all practical purposes. One whose services are usually considered casual, incidental or occasional. These observations seem to answer question 1.

The distinction between principal contractors, independent contractors and servants or employees is recognized by the laws of Florida and her courts. "An independent contractor has been defined as one who pursues an individual employment or occupation and represents his employer as to the result of his work but not as to the means by which the results are accomplished." (Florida Industrial Comm. v. Orange State Oil Co., 155 Fla. 772, 21 So. 2d 599, text 604; Gentile Bros. v. Florida Industrial Comm., 151 Fla. 857, 10 So. 2d 568, text 570). An independent contractor is defined in 56 C. J. S. 41, §3(1), as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the results of his work; an independent contractor is not a servant, and there is no master and servant relation between his servants and the employer or contractee." "In determining whether the relationship is that of master and servant or contractee and independent contractor, each case must be determined on its own facts and all the features of the relationship are to be considered." (56 C. J. S. 45, §3(2)). Statutes and acts of the legislature, under which independent contractors may be regulated, permitted or authorized, should also be taken into consideration and considered to the extent they do not conflict with provisions in the general appropriations act. A servant is one who works under his master's direction and control, whereas an independent contractor is engaged to do certain work, but to exercise his own discretion as to the mode and manner of doing it. Day laborers, common laborers, and similar terms used in the present and past general appropriations acts clearly contemplate employments, from day to day or other temporary nature, for the performance of unskilled and similar labor, and not independent contractors.

We feel that the key, generally, as to whether independent contractors may be employed and paid from general appropriated funds, whether from salary or expense appropriations, is to be determined from the budget of each separate state officer, agency, commission, board, or other spending agency, submitted by it to the state budget commission and by that commission included in its report to the legislature. Although this budget and the report of it to the legislature by the state budget commission should be resorted to in each case of employment or independent contract for the performance of services for the state is persuasive, it is not conclusive. Where the general appropriations act, construed in the light of the budget for each spending agency, and the report of the same to the legislature by the budget commission, shows that an appropriation was made for an employment it may not be used for entering into an independent contract unless such use is authorized by the appropriations act; and the converse of this proposition would also seem to be true. Although valid limitations in the general appropriations act will suspend general statutes and laws on the same subject, should it be determined that any such limitation violates §30, Art. III, State Const., prohibiting the inclusion in a general appropriations act of provisions on other subject matters, or violates any other fundamental law, then existing statutes, such as §216.24, F. S., might become applicable and should be followed.

The above observations seem to answer the above stated ques-



tion as well as the same may be answered generally. Each case may depend for answer upon more than one factor; and especially the legislative treatment of the same, as may be reflected from more than one source, including the budget submitted to the legislature through the state budget commission.

059-140—July 10, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS**  
**FRONTONS—MAXIMUM NUMBER OF DAYS OF**  
**OPERATION DURING 12-MONTHS PERIOD—**

§§550.04, 550.12 AND 551.15, F. S.; CH. 59-417

To: *John R. Ring, Chairman, State Racing Commission, Miami*  
**QUESTIONS:**

1. If the applicant, Volusia Jai Alai, Inc., should request summer operating dates, what is the maximum number of days which may be allowed under §550.04, F. S., beginning June 1 to and including Sept. 30 of a given year?

2. If the applicant, Volusia Jai Alai, Inc., should request winter operating dates, what is the maximum number of days which may be allowed by the state racing commission between the dates of Dec. 1 of one year to and including April 10 of the following year?

3. May racing dates be granted to the Volusia Jai Alai, Inc. at Daytona Beach, during any 12-month period, both during the periods from and including Dec. 1 of each year to and including April 10 of the year following, and during the period June 1 up to and including Sept. 30, so that the combined days of operation would be in excess of 100 days exclusive of one scholarship day and one charity day?

**AS TO QUESTION 1:**

In the case of Volusia Jai Alai, Inc. v. McKay, 90 So. 2d 334, the legal questions were the validity of the permit which had been granted by the racing commission and whether or not a jai alai fronton located south of Matanzas Inlet and east of the St. Johns River could operate during the summer or whether the time fixed in §550.12, F. S., Dec. 1 of one year and ending the ensuing April 10, limited the jai alai season.

The supreme court held the permit valid and held that the fronton could be operated during the summer period but limited the summer operation to 90 days. The court said:

We conclude that the permit was valid and the operation dates legal but that summer operation should be limited to 90 days.

Therefore, the answer to question 1 is that the maximum number of days which may legally be granted to Volusia Jai Alai, Inc. for summer operation is 90 days, which, of course, does not include one day for scholarship and one day for charity.

**AS TO QUESTION 2:**

The supreme court of Florida, in the case of Volusia Jai Alai, Inc. v. McKay, supra, on p. 339, said:

... It is provided that the commission shall not limit the number of operation days "in any twelve-month period ... to less than ninety days" during the period from the

1st day of December to the 10th day of April. If the twelve-month period is computed from the first available operation day, *Stein v. Biscayne Kennel Club, Inc.*, 145 Fla. 306, 199 So. 364, and the summer racing and winter racing seasons specifically authorized in Section 550.04, are applied to fronton operation, the proviso may be construed as a guarantee to fronton operators of a 90-day season in the winter period and such season in the summer period as the commission may in its discretion assign. Under such a construction the relevant parts of the various acts are preserved . . . .

This case holds that fronton operators are guaranteed 90 days operation between Dec. 1 of one year to and including April 10 of the following year. It has long been the administrative ruling of the commission that a maximum of 100 days in any 12-month period may be granted to an applicant within this period of time, and that situation still holds true except in cases where certain fronton operators, under a 1959 act, elect to use a portion of their operational days during the summer period.

The legislature in 1959 enacted Ch. 59-417, which provides, among other things, that where there are two or more jai alai frontons operating under valid permits located within a radius of 35 miles of each other, one of such permit holders may operate for a period not to exceed 50 days of its aggregate number of days allowed by §551.12, F. S., from July 1 to the first Monday of September, both dates inclusive. This act also provides that when a fronton is granted summer operational dates under the law such permittee shall not operate jai alai fronton exhibitions more than a total of 100 days plus scholarship and charity days in the 12-month period in which said summer operation is permitted.

We understand that Ch. 59-417 does not specifically apply to the fronton located in Volusia county, however, this act must be read in *pari materia* with §551.12, F. S., and must be considered along with the decision of the supreme court in the *McKay* case, *supra*. Therefore, in order to apply the law in a like manner to all jai alai fronton operators it is our view that the maximum number of days which can be granted by the racing commission to any fronton operator during any 12-month period is 100 days plus one day for scholarship and one day for charity.

AS TO QUESTION 3:

What we have said under question 2 necessarily answers question 3 in the negative.

059-141—July 21, 1959

#### TAXATION

FEEES FOR ISSUANCE OF CERTIFICATES OF REGISTRATION OF PLEASURE BOATS—DISPOSITION BY TAX

COLLECTOR OR AGENT—CHS. 59-399, 57-868;

§§371.051(2), 371.121 AND CH. 145, F. S.

To: J. M. Gwin, Tax Collector, Wakulla County, Crawfordville

QUESTION:

Is the fee of the tax collector, in connection with certificates of registration for pleasure boats, income of the tax collector's office?

Chapter 59-399, laws of Florida, creates Ch. 371, F. S., to be

known as the "Florida motor boat registration and certification act." Certificates of registration for pleasure boats are to be issued by the tax collector of each county or his agent, and the tax collector or his agent is allowed a fee of 25¢ for each certificate issued. For each classification of motor boats other than commercial boats, there is a registration fee provided by §371.121, F. S. In addition to those required fees, the payment of a 25¢ service charge for the issuing agent is also required.

Section 371.051(2), F. S., makes the issuing of certificates of registration for pleasure boats an official duty of the tax collector or his agent. Statutory fees of public officials in connection with performance of an official duty are income of the official's office (*Orange County v. Robinson*, 111 Fla. 402, 149 So. 604; *Carlton for use of Duval County v. Fidelity and Deposit Co. of Maryland*, 151 So. 291, 113 Fla. 63). Hence, the compensation of the tax collector for issuing certificates of registration for pleasure boats is to be considered as income of his office in computing the annual compensation of said officer under the provisions of Ch. 145, F. S.

The agent referred to in this act does not appear to be a public officer whose compensation is subject to the limiting provisions of Ch. 145, F. S. Therefore, the 25¢ fee authorized the agent of the tax collector by this act should be considered as the personal compensation of the agent.

The above comments deal with this particular fee under the general laws applicable to all counties and are not intended to answer questions concerning said fees arising under acts of local application. For example, the tax collector of Wakulla county is authorized an annual salary in the amount of \$3,600 (Ch. 27110, 1951, as amended by Ch. 57-868). Section 4 of the amending act provides as follows:

*The tax collector and assessor of taxes of each such county shall pay over to the board of county commissioners of each such county all fees and commissions received by them, except that the tax collector may retain, as part of the compensation, all fees received by them in connection with the registration and licensing of motor vehicles. (Emphasis supplied).*

Thus, the tax collector of Wakulla county is required to turn the 25¢ registration fee, provided by §371.051(2), F. S., over to the board of county commissioners although the agent of said tax collector would be authorized to retain as his compensation each 25¢ fee collected.

059-142—July 24, 1959

#### STATE FINANCE

CHAPTERS 59-318 AND 59-319 AMENDING §§287.011(2), 287.061, 287.081 AND 283.10 PERTAINING TO CLASS B PRINTING—CHS. 283 AND 287, F. S.

To: *Ralph Siller, Executive Secretary, State Purchasing Commission, Tallahassee*

#### QUESTIONS:

1. What effect do Chs. 59-318 and 59-319, have upon the purchases of class B printing?
2. What interpretation is to be given the words

**"to requisition" found in §2 of Ch. 59-318?****AS TO QUESTION 1:**

Chapter 59-319 amends §283.10, F. S., by providing that competitive bids shall be required on all purchases of class B printing in excess of \$50 and by advertising as required by §287.081, F. S., on contracts in excess of \$2,000, "subject to the other provisions of said section."

Chapter 59-318 amends the state purchasing commission law so as to include class B printing within the definition of "commodities." It also provides for emergency purchases of public printing.

The obvious purpose of Chs. 59-318 and 59-319 is to place class B printing under the provisions of Ch. 287, F. S., (state purchasing commission), and at the same time leave in full force and effect the applicable statutes of Ch. 283.

Statutes relating to the same person or thing or to the same class of persons or things may be regarded in *pari materia* (*Sanders v. State ex rel Shamrock Properties, Fla.*, 46 So. 2d 491). To ascertain legislative intent, statutes in *pari materia* must be examined (*State ex rel Harris v. Bowden*, 112 Fla. 288, 150 So. 2d 259). The intent of the legislature must be gathered from the language used and the purpose to be accomplished by the statute (*Whidden v. State*, 159 Fla. 691, 32 So. 2d 577). A statute, as amended, becomes "... for all purposes in the future the Section of the original Act." (*Miami Bridge Co. v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356).

Under the foregoing rules of statutory construction, it is clear that Chs. 283 and 287, F. S., as amended by the 1959 legislature, must be read together.

This answers question 1 as definitely as possible.

**AS TO QUESTION 2:**

Chapter 59-318, F. S., in §1 places class B printing under Ch. 287, F. S. Section 2 provides that the procedures administered by the state purchasing commission must comply with the provisions of Ch. 283, F. S. (public printing). Consequently, the provisions of Ch. 283 in effect prior to the 1959 legislature applicable to class B printing, together with the amendment to §283.10, F. S., by Ch. 59-319 are in full force and effect and the procedures and regulations adopted by the state purchasing commission must conform with said Ch. 283, F. S.

The second sentence of §2 of said Ch. 59-318 is the emergency provision whereby a departmental head may, under the terms of the statute, file with the purchasing commission a statement under oath certifying his reasons for requesting exemption from the provisions of the state purchasing law and the commission may, if the same is in conformity with law, authorize the purchase without competitive bids. It is to be noted that the statute provides if the departmental head "should determine, from the nature of the type printing to be done, that it would be detrimental to the interests of the state *to requisition* certain printing through the state purchasing commission . . ." he may make the statement under oath and file the same with the commission. (Emphasis supplied). Since purchases of and contracts for class B printing under the 1959 legislative amendments now fall within Ch. 287, F. S., we should examine that chapter to determine the legislative intent in using the italicized words. The purpose of Ch. 287 is the regulation by the commission under appropriate rules and regula-



tions of the purchase "... by any agency of any commodity or commodities and establishing standards and specifications for a commodity or commodities and the maximum fair price of a commodity or commodities." (§287.061 (1), F. S.). In addition, there is no indication from the wording of said Ch. 287 that the purchase of the various commodities required by state agencies should be made upon *requisition* through the state purchasing commission—in other words that the commission should actually make the purchase. Rather, the tenor of its language, in particular §287.061 (2), F. S., is that purchases of "commodities" which now include class B printing shall be made by the state agency concerned, *but under rules and regulations of the state purchasing commission*.

The only sensible construction to be placed upon the words "to requisition," found in §2 of Ch. 59-318, is that such purchases as approved by the state purchasing commission are to be made through or under regulations, rules and control of the state purchasing commission by the agency concerned, not by the state purchasing commission itself.

This answers question 2.

059-143—July 24, 1959

**REGULATION OF PROFESSIONS AND VOCATIONS  
NATUROPATHY—CHAPTER 59-164 (§462.022), RENEWAL OF  
NATUROPATHIC LICENSE AFTER JULY 1, 1959**

To: *Julio Gavilla, Secretary-Treasurer, Florida State Board of Naturopathic Examiners, Tampa*

**QUESTION:**

**What are the requirements under Ch. 59-164 for registration in this state as a naturopathic physician subsequent to July 1, 1959?**

Section 1, Ch. 59-164, provides, "That upon the effective date of this act the licensing powers of the State Board of Naturopathic Examiners as provided by law be and the same are hereby abolished. *Only those naturopathic physicians that are presently practicing and licensed, and have been residents for two years in the State of Florida prior to enactment of this law may renew their licenses.* (Emphasis supplied.) This law does not affect any other functions of the State Board of Naturopathic Examiners." Section 3 of said chapter states that "This act shall take effect on July 1, 1959."

Although it appears from the foregoing provisions that "upon the effective date of this act" the licensing powers of the board of naturopathic examiners are abolished, it is probable that this refers only to powers of the board in issuing original licenses and not to the power of the board to renew existing licenses. This construction is evidenced by the fact that the latter provisions of the above quoted section indicate that the board is to renew existing licenses after July 1, 1959, providing that certain requirements have been met by the applicants; and by the fact that Ch. 59-164 "does not affect any other functions of the State Board . . .," one of said functions being the renewal of existing licenses to practice, under Ch. 462, F. S.

Chapter 59-164 appears to authorize the renewal of naturopathic licenses after July 1, 1959, only to those persons who are (1) "naturopathic physicians that are presently practicing and licensed, and (2) have been residents for two years in the State

of Florida prior to the enactment of this law . . . ." In order to meet the requirements of (1), supra, a naturopathic physician must have been "presently practicing and licensed" on July 1, 1959, inasmuch as the word "presently" would appear to refer to the effective date of the chapter. Furthermore, it would seem that a person seeking a license renewal must have been practicing and licensed in the state prior to July 1, 1959, since if said persons had been practicing and licensed outside of this state prior to July 1, 1959, without having been licensed in this state, they would be unable to obtain an initial license in Florida, since after the above date the board is without power to issue an initial license.

Under the second requirement, naturopathic physicians must have been residents of this state for two years prior to July 1, 1959, since the enactment of a law has reference to its effective date (*State v. Gibbons*, 118 Wash. 171, 203 P. 390, text 392; *In re Initiate State Question No. 10*, 26 Okla. 554, 110 P. 647, text 648). Furthermore, a literal reading of the second requirement would indicate that the two years residency requirement must have been met immediately prior to July 1, 1959, in order that the applicant be granted a license renewal.

Consequently, it would seem that license renewals are limited to those naturopathic physicians which have been practicing and licensed in this state prior to July 1, 1959, and who have resided in the state immediately prior to said date.

The above observations appear to answer your questions.

059-144—July 27, 1959

**REGULATION OF TRADE, COMMERCE & INVESTMENTS**  
**TRADING STAMPS—PERSONS ISSUING FOR THEIR OWN**  
**ACCOUNT AND OTHERS TO USE—CH. 59-311**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

Where the operator of a chain of grocery stores issues trading stamps for his own account to his own customers, but at the same time sells like stamps to other store operators for issuance by them to their customers, all such stamps to be redeemed by the said operator of the chain stores, does either or both transactions come within the purview of Ch. 59-311?

By our opinion of July 10, 1959 (059-138) we construed said Ch. 59-311 as applying only to those persons, firms or corporations within the definition of a "trading stamp company" contained in said chapter; that is, to persons, firms or corporations "distributing trading stamps for retail issue by others, or in redeeming trading stamps for retailers." The act was construed as not applying to those persons issuing their own trading stamps to their customers and redeeming same themselves.

Here the operator of the chain of grocery stores is not within the purview of the act as to those trading stamps issued for its own account to its customers and redeemed by it; however, it appears to be a trading stamp company, and within the purview of the said act, in so far as it furnishes trading stamps for issuance by other retailers, to be redeemed by the said chain, or in so far as it may redeem trading stamps for others. These observations seem to answer the above stated question.

059-145—July 27, 1959

## COUNTY FINANCE

APPLICATION OF CH. 59-23, AMENDING LAWS RELATING TO HANDLING OF PUBLIC MONEY TO MOSQUITO CONTROL DISTRICTS—§§136.01, 136.02, 136.04, 136.06, 136.07, 219.05, 237.32, 388.021-388.061, 388.081-388.101, 388.161, 388.191, 388.211, 388.221, 388.241, 388.261-388.281, 388.371, 388.381 AND 659.24, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

## QUESTION:

Are the provisions of Ch. 59-23 applicable to the funds of mosquito control districts?

Chapter 59-23, effective May 6, 1959, is by its title "an act relating to public monies and the funds of county officers, boards of county commissioners, and boards of public instruction and the several counties and depositories thereof." (Emphasis supplied.)

Said chapter amends §§136.01, 136.02, 136.04, 136.06 and 136.07 of the county depository law, §219.05 of the public money law and §237.32 of the school code. It also repeals §136.09, F. S.

Section 136.01, F. S., as amended by this chapter provides:

Any bank, national or state, authorized to do business in this state which will, as to the various funds hereinafter referred to, offer satisfactory inducement as to security as herein provided is hereby created and designated a county depository for the funds for which such security shall be furnished and may receive such public funds in the manner and method hereinafter provided. The funds hereinabove referred to shall include: county funds, funds of all county officers, and funds of the county board of public instruction; the enumeration of said funds being herein made, not by way of limitation, but of illustration, and it being the intent hereof that all funds of such county or of the board of county commissioners or the several county officers or of the board of public instruction of such county, shall be included. (Emphasis supplied.)

Section 136.02 (1) as amended by this chapter provides the procedure whereby banks may become county depositories by depositing with or to the credit of the comptroller of the state certain securities in an amount to be determined by the comptroller to insure the safekeeping of all county funds.

Subsection (2) of this section requires that on the first day of each month county officials and boards maintaining funds on deposit in any bank qualified as a county depository shall file with the clerk of the circuit court of such county a written report setting forth the balance of each fund on deposit in each bank in which such funds are deposited. Not later than the 5th of each month, the clerk of the circuit court is required to file a consolidated report of such fund balances with the comptroller of the state.

Section 219.05 as amended by this chapter provides among other things that "any public money may be paid directly to the office, person or fund entitled to receive it, without first depositing it in the depository, if the receipt is taken and the transaction is properly recorded in the cash book."

Section 237.32, as amended by this section, applies to school funds and therefore need not be discussed herein.

Chapter 59-195, effective Aug. 6, 1959, viz. 60 days after ad-

jourment of the 1959 legislative session, consolidates general law relating to the creation, powers and duties of mosquito control districts by repealing §§381.421-381.571, Chs. 388-390, and enacting a new Ch. 388.

Special tax districts for the control of mosquitoes and other arthropods may be created in cities, towns or counties, or any portions thereof, whether such portions include incorporated territory or portions of two or more counties in the state, by petition of 15% of the resident freeholders of the affected territory. Public hearings on the question of the creation of such special tax districts are required as well as a freeholders election (§§388.021-388.061, F. S.).

The ballot in the election on the question of establishment of such districts shall also contain names of candidates for commissioners of such district (§388.081, F. S.).

If the affirmative vote of the freeholders in the election establishes such district, the three persons receiving the highest number of votes in such election shall be designated the commissioners of said district (§388.101, F. S.).

The board, so comprised, is charged with the responsibility of doing all things necessary for the control and elimination of mosquitoes and arthropods within the district and is vested with all powers of a body corporate (§388.161, F. S.).

The ballot in the freeholder election for the establishment of a mosquito control district shall also submit the question, "Shall a separate or special board of commissioners conduct the work?" (§388.091, F. S.).

In those counties where a mosquito control district is created by affirmative vote of the freeholders, but the freeholders deem that the affairs of such district shall not be administered by a special board of mosquito control commissioners; all the rights, powers and duties of the board of mosquito control commissioners conferred by this chapter shall be vested in the board of county commissioners of the county (§388.241, F. S.).

The governing body of the district is required to prepare an annual budget. It may, by its petition, request the county commissioners to change the boundaries of said district by an election called for that purpose (§388.211, F. S.). The district board may levy taxes, not exceeding 10 mills, on property within the district to be used solely for the purposes authorized by this chapter in the following manner. The levy of said board is certified to the board of county commissioners in which the district is located, who then perform the ministerial duties of requiring the tax assessor and collector to assess and collect the levy in the same manner as other taxes and to pay over to the governing body of the district taxes so collected (§388.221, F. S.).

The governing body of the district may exercise the power of eminent domain (§388.191, F. S.).

The district is authorized to receive and use, for the purposes of this act, state funds released to the state board of health by the budget commission (§§388.261-388.281, F. S.).

Municipalities and counties are authorized to cooperate with such districts by making available to the district any funds budgeted for mosquito control (§§388.371-388.381, F. S.).

All state funds released to districts under this chapter are to be used under a plan to be approved by both the state board and district (§388.281, F. S.).



In view of the foregoing provisions of Ch. 59-195, codifying the general law relating to the creation, powers and duties of mosquito control districts, it is my opinion that such districts are entities completely separate and independent of the several counties. Hence, the new county depository law, Ch. 59-23 is inapplicable to the funds of such districts. Unquestionably, the funds of such districts are public monies and as such, when placed on deposit with banks, are adequately secured against loss by the provisions of §659.24, F. S., which designates banks as depositories of public monies under the regulation of the state banking commissioner.

059-146—July 28, 1959

**CRIMINAL PROCEDURE**  
**DISCHARGE OF FORFEITURE OF CASH BOND—TIME**  
**LIMITATION—§903.27, F. S.**

To: Warren H. Edwards, County Solicitor, Orange County, Orlando

**QUESTION:**

For how long a period of time does the judge of the criminal court of record have jurisdiction whereby he can set aside the estreature of a cash bond?

The statutory requirements relative to when and how a bail bond will be forfeited are set forth in §903.26, F. S.

Section 903.27, F. S., contains provisions relative to discharge of forfeiture and provides as follows:

If, at any time within ten days after the undertaking has been *forfeited*, the breach of the undertaking is satisfactorily explained and the defendant shall in all other respects have complied with the conditions of the undertaking, the court before which the case is pending may direct the forfeiture of the undertaking to be discharged upon such terms as are just. (Emphasis supplied.)

Under the provisions of the above-quoted section of the Florida Statutes, the defendant is given 10 days after the *forfeiture* of the bond within which to explain the breach thereof and to seek a discharge of the *forfeiture*.

In view of the above, it is my opinion that the court could discharge the *forfeiture of a cash bond* only if the breach thereof is satisfactorily explained within 10 days after the bond was forfeited.

059-147—July 30, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES**  
**ELIGIBILITY OF ATTORNEY FOR COUNTY COMMISSIONERS**  
**FOR POSITION OF ASSISTANT STATE**  
**ATTORNEY—§125.03, F. S.**

To: Lovick P. Williams, Assistant State Attorney, Inverness

**QUESTION:**

May an attorney employed by the board of county commissioners of a county as county prosecutor under §§125.03 and 125.04, F. S., also hold the office of assistant state attorney?

A. G. O. 057-25 appears to be directly in point inasmuch as it held that one holding an office in the government of the state may be employed as county prosecutor under §125.03, F. S.

For the reasons stated in said opinion 057-25, your question is answered in the affirmative.

059-148—July 31, 1959

### CITIES AND TOWNS

#### LIABILITY OF MUNICIPALITY FOR MEDICAL CARE OF PRISONERS SERVING SENTENCES IN ITS JAIL

To: *Claude S. Jones, City Attorney, Belle Glade*

#### QUESTIONS:

1. Is the city required by law to furnish and pay for hospitalization and medical care for a prisoner who is serving a sentence imposed by the municipal court of Belle Glade?

2. Should the city of Belle Glade fail or refuse to furnish such hospitalization and medical care, and the prisoner subsequently complains of permanent disability resulting from the alleged negligence of the city, is the city liable in tort for any damages that might be proven?

3. If the disability is such that the prisoner requires hospitalization during the term of his sentence, and that hospitalization continues for a period of several months, far in excess of the term of his sentence, is the said city lawfully liable for such expense of medical care for the entire period of hospitalization and treatment to the hospital, to the doctor, or to the prisoner, either or any?

4. May the said city be relieved of liability as to medical and hospital bills if the municipal judge upon learning of the illness, suspends the remaining portion of the sentence of that prisoner?

5. If the above question is answered in the affirmative, would that be true even though the said city had taken the prisoner to the hospital and engaged a doctor to attend him?

6. If a person has been sentenced for a specified number of days, and a portion of that time is spent in a hospital at the expense of the said city, is the time so spent in a hospital credited to his total sentence?

7. If answers to any of the foregoing questions indicate that the said city is financially liable for hospital bills, doctor bills or medical care, how can the said city protect itself best from such financial and unexpected responsibilities?

#### AS TO QUESTION 1:

It is stated in your letter that the city charter and ordinances of the city of Belle Glade are silent on the matters raised in the above questions. Therefore, any duty on the part of the city of Belle Glade to provide medical care to city prisoners would necessarily be imposed by general law.

Although boards of county commissioners are required by §951.03, F. S., to provide medical care to county prisoners working on the public works of the county, I have been unable to find

any similar statutory provisions applicable to municipal prisoners.

This question does not appear to have been considered by the courts of this state and only a few cases have been found where the question was raised in the courts of other states. It seems, however, that even in the absence of some express provision requiring a municipality to furnish medical services to its prisoners, the municipality would be liable for the cost of such services.

In the case of *City of Tulsa v. Hillcrest Medical Center*, 292 P. 2d 430, the medical center brought suit against the city of Tulsa, Okla., to recover for hospital and medical services rendered to prisoners of the city. In this case, the supreme court of Oklahoma held the city liable for such hospital and medical services stating:

\* \* \*

No statute or ordinance has been brought to our attention specifically imposing a duty upon the City to provide medical and hospital services to its *indigent* prisoners. If such a duty does exist it must be by implication. No statute or ordinance has been called to our attention detailing the procedure for payment for such services.

(3) An examination of our constitutional and statutory provisions will demonstrate the protective measures that have been provided for prisoners. Cruel and unusual punishments are forbidden. Art. 2, Sec. 9, Oklahoma Constitution. County and city jails must be kept clean, 63 O.S. 1951, §§ 471, 472 and 473. County Commissioners are authorized to appoint a physician to the county jail when they deem it necessary, 57 O.S. 1951 § 51. 63 O.S. 1951 § 475, contemplates that physicians will be provided for county and city prisoners. It is stated therein, that if any prisoner in any county or city jail complains of illness, the county or city physician shall be summoned. 68 O.S. 1951 § 341(B), authorizes cities and towns, whether under city charter or laws of this State, to contract debts for board, maintenance and medical care of prisoners, pending the expiration of time within which tax protests may be filed.

We think the foregoing statutes make it abundantly clear that cities are authorized to appropriate money for the purpose of providing prisoners with necessary medical attention.

\* \* \*

(4, 5) We conclude that the services rendered by the plaintiff were proper charges against the City under the facts in this case. This is not to say, and we do not hold, that the governing board of the city may not exercise control in the matter of furnishing medical treatment for its prisoners if such board adopts plans and makes provision therefor. We do hold that the Chief of Police is under a duty to provide necessary medical treatment for prisoners in his custody, and in the absence of arrangements made by the Mayor and City Commissioners for necessary medical services for such prisoners, the City is liable for necessary medical services obtained by its Chief of Police in the care of indigent city prisoners.

The statutes cited by the supreme court of Oklahoma in the above-cited case, as indicative of a legislative intent upon which to imply a duty on the part of a municipality to provide medical

and hospital services to its indigent prisoners, do not all have counterparts in the statutes of this state. However, the statutes which have been cited herein as imposing a duty on the state to provide medical care for its prisoners, certainly indicate that persons in jail in this state are to receive necessary medical care. Also, §167.28, F. S., authorizes cities to "provide for the support of the poor, the infirm and the insane." These statutes appear to make it clear that municipalities are authorized to appropriate money for the purpose of providing necessary medical care to its indigent prisoners.

The following statement, relative to this question, is found in 72 C. J. S., Prisons, §25 (4):

Under a statute providing for medical attendance to prisoners, and compensation therefor, the general rule is that no allowance may be made except under the circumstances and in the manner provided by statute; but an exception to this rule has been recognized in the case of a physician employed in the case of an emergency. *In the absence of a statutory provision for medical attendance it has been held that such attendance is a proper expense of imprisonment.* However, it has also been held that the employment of a physician by a sheriff or by jail inspectors does not impose liability on the county for services rendered by the physician, and that no payment may be made out of the county fund for nursing a prisoner confined in a jail on a criminal charge.

There is, however, authority for the proposition that municipalities are not liable for necessary medical care furnished to prisoners in the absence of an express provision of the law requiring the same. In 41 Am. Jur., Prisons and Prisoners, §24, it is stated:

§ 24. Medical Service or Medicine Furnished Prisoners.—As a general rule it seems that in the absence of some express provision of the law, the public is not liable to a physician or surgeon for services rendered prisoners even though they are insolvent and unable to pay for such services themselves. . . .

See also the case of Trinity Hosp. Assn. v. City of Minot, 76 N. W. 2d 916, and the annotation in 44 A. L. R. 1285.

Although there is a split of authority on this question, I am of the opinion that the better reasoning is represented by the opinion of the supreme court of Oklahoma in the City of Tulsa case, *supra*. Therefore, question 1 is answered in the affirmative as to indigent prisoners. Prisoners who are able to provide necessary medical care for themselves from their private resources should do so if the need for such care does not flow from any negligent act on the part of the city which would subject the city to a tort action for the reasons stated in my answer to question 2.

#### AS TO QUESTION 2:

The supreme court of Florida has held a municipality liable in tort to a prisoner infected with a communicable venereal disease communicated to the prisoner by another prisoner who was not segregated from the remaining prisoners as required by law. (See *Lewis v. City of Miami*, 173 So. 150.) Also, in the case of *Hargrove v. The Town of Cocoa Beach, Florida*, 96 So. 2d 130, the city was held liable in tort for "a direct, personal injury proximately



caused by the negligence of a municipal employee while acting in the scope of his employment."

In view of the above-cited cases, a municipality would be held liable for injuries or illnesses proximately caused by the negligence of a municipal employee acting in the scope of his employment which would include disabilities suffered as a result of a city negligently failing to furnish necessary medical care to an *indigent* prisoner.

Therefore, question 2 is answered in the affirmative.

#### AS TO QUESTION 3:

Inasmuch as the liability of the city for medical care for its prisoners is based upon the incarceration of the prisoner, the termination of the sentence would serve to terminate the liability of the city. In order to avoid disputes and maintain the best public relations, I would suggest that this fact be called to the attention of any doctor or hospital rendering medical services to a prisoner.

Question 3 is answered in the negative.

#### AS TO QUESTION 4:

Any legal termination of the sentence would operate to relieve the city of liability for the reasons stated above.

#### AS TO QUESTION 5:

If a contract for the provision of medical care to a prisoner until the date when the prisoner's sentence would be served was entered into by the appropriate city official, I believe that the city would be liable for the cost of such care until the date specified even though the prisoner was released before that date. However, if the contract provided either for the furnishing of medical care until the expiration of the prisoner's sentence (no date specified), or for the furnishing of such care until the date of expiration of his sentence or other lawful release, whichever first occurred, then the early release would operate to relieve the city of further liability.

#### AS TO QUESTION 6:

A prisoner confined to a hospital is still in the custody of and restrained by the authority to which he was committed by the sentence imposed against him. (See annotation in 62 A. L. R. 246.)

Therefore, question 6 is answered in the affirmative.

#### AS TO QUESTION 7:

I am of the opinion that this question deals largely with policy matters which can be properly answered only by the city of Belle Glade. However, in an effort to be of some assistance, the following possibilities are mentioned:

1. Insurance — Whether this type of insurance is available is unknown.

2. Budgeted reserve — It would seem to me that this would not work too well in practice inasmuch as one serious illness would cost thousands of dollars whereas the normal illness would cost only a few dollars and, therefore, the annual cost could not be accurately estimated.

3. Ordinances defining responsibility — It would seem appropriate that ordinances defining the responsibilities of the city and the procedures to be followed by the appropriate officials in carrying out those responsibilities should be adopted.

059-149—July 31, 1959

### CRIMINAL PROCEDURE

#### FLORIDA HIGHWAY PATROL—DELIVERING OF PRISONERS AND PRESENTATION OF CASES UNDER DADE COUNTY HOME RULE CHARTER

To: *H. N. Kirkman, Director, Department of Public Safety,  
Tallahassee*

#### QUESTIONS:

1. Under Dade county home rule charter to what officer should Florida highway patrolmen deliver prisoners and bond money?

2. Can cases charging violation of state statutes made by Florida highway patrolmen be prosecuted in the metropolitan court of Dade county?

With regard to question 1, your attention is respectfully directed to the Dade county home rule amendment, A.8, S.11 (1) (f), and to §1.01(A) (19) on home rule charter, which provided that the powers and duties theretofore executed by the sheriff of Dade county were transferred to the director of public safety, who retained the title of sheriff under ordinance 58-15 (5-6-58). The authority of Dade county to effect this transfer was upheld in *Dade county v. Kelly*, (Fla.) 99 So. 2d 856.

Under the above authorities it would appear Florida highway patrol officers should continue to deliver bond money and prisoners to the sheriff of Dade county, who now also is known as the public safety director of Dade county.

As to question 2, the jurisdiction of the metropolitan court of Dade county is limited to cases arising under ordinances adopted by the board and would be without authority to try cases charging violation of state statutes.

It should be noted that the state attorney for Dade county prosecutes in the name of the county all ordinance violations, and therefore all prosecutions in metropolitan court, as well as prosecutions in the several state courts for violations of all state statutes. Under authority of the home rule amendment and the home rule charter, Dade county has adopted a county-wide metropolitan traffic code, ordinance 57-12, which establishes a uniform code of traffic regulations for all streets and highways within Dade county. Violations of this ordinance may be prosecuted in the metropolitan court. All law enforcement officers, including the Florida highway patrol, are authorized to make arrests and issue summonses in the enforcement of the metropolitan traffic code, and the Florida highway patrol could, if it should desire, elect to write its cases for traffic violations occurring within Dade county under the metropolitan traffic code. If the officers did so, these cases would be tried in the metropolitan court.

From the above statutes and authorities, question 2 must be answered in the negative.

059-150—July 31, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
ASSIGNMENT OF WAGES BY GOVERNMENT EMPLOYEES—  
§516.17, F. S., AGO 051-92**

*To: O. Ralph Matousek, City Attorney, Homestead*

**QUESTION:**

**Does the 1953 amendment to §516.17, F. S., alter the holding in A. G. O. 051-92 wherein it was held that government employers are not bound by wage assignments tendered under the provisions of §516.17, F. S.?**

The 1953 amendment (Ch. 28011) merely deleted the last paragraph of §516.17, F. S., which provided the maximum rate of salary deduction, and does not materially affect the statutory provision insofar as the previous ruling of this office is concerned. Therefore, A. G. O. 051-92 is reaffirmed as of this date.

In summary, the holding of this office based upon the authorities previously cited (4 Am. Jur. 264, Assignments, §46) is that wage assignments provided for in §516.17, F. S., are not applicable to or valid when executed by government employees, and therefore not binding on government employers.

059-152—August 6, 1959

**LABOR  
UNEMPLOYMENT COMPENSATION LAW—PROVISION BY  
RULE OR REGULATION FOR PAYMENT OF UNEMPLOY-  
MENT COMPENSATION BENEFITS FOR IRREGU-  
LARLY PAID WORKERS — CHAPTER 59-55;  
§§443.02, 443.04(2), 443.04(4), 443.05(5), AND  
443.20, F. S.**

*To: James T. Vocelle, Chairman, Florida Industrial Commission,  
Tallahassee*

**QUESTION:**

**May the Florida industrial commission provide unemployment compensation benefits for irregularly paid workers by rule or regulation, in view of the new provisions of Ch. 59-55?**

Chapter 59-55, amends §§443.04 and 443.05, F. S., relating to unemployment compensation. It provides the formula for computation of average weekly benefits, the duration of such benefits and certain conditions for benefit eligibility. The new §443.04(2) (d), subparagraphs 1, 2, 3 and 4, pertain to the interim period beginning July 1, 1959, and ending July 1, 1960. After July 1, 1960, the permanent provisions of §443.04(2) (a), (b) and (c) become effective.

Close study of these sections reveals they are substantially the same except that because the number of weeks of employment have not heretofore been required to be reported, total weeks of employment of a claimant during the interim period is to be determined by dividing his total wages of insured employment by his average weekly wages. The formula provided for the determination of an individual's average weekly wages is substantially the same in both the permanent and interim provisions of §443.04(2), F. S.; viz., average weekly wages are computed by dividing the

total wages paid to him in that quarter of his base period in which such wages for insured employment were highest, by 13 during the interim period, and after July 1, 1960, by the total number of weeks reported for him by his employers in such quarter, *but such total shall be not more than 13.*

This chapter also amends §443.05(5), F. S., thereby effecting a change in the conditions precedent to receiving unemployment compensation. Said section requires that an unemployed individual, to be eligible to receive benefits, shall have received 20 times his average weekly wages during his base period; provided, however, no unemployed individual shall be able to receive benefits if his average weekly wage is less than \$20. The term "average weekly wages" in this section is not defined by the legislature. Thus we must look to the other sections of this chapter in determining the meaning of "average weekly wages" for eligibility purposes and extrinsic aids to statutory construction may not be used (*Florida State Racing Commission v. McLaughlin*, 102 So. 2d 574).

Examination of Ch. 59-55 in connection with Ch. 443, F. S., reveals that the following provision was not disturbed by the amendments setting up the criteria for determining average weekly wages:

Section 443.04(4)(b). If the remuneration of an individual is not based upon a *fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to employment benefits only shall be determined in such manner as may by regulations be prescribed.* Such regulations, so far as possible, *secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals.* (Emphasis supplied.)

The reason the legislature allowed this provision to remain in the statute is for the very apparent purpose of providing a means for determining the average weekly wages of irregularly paid employees. It recognized that there would be many diverse situations that could be successfully handled only through an appropriate administrative rule. We think there is vested in the Florida industrial commission, by the section above, rule-making power to cover irregularly paid individuals such as seasonal workers, piece-rate workers and others.

It has been brought to our attention that anomalous situations will result if strict application of the language of §443.05(5), F. S., is applied to all applicants.

The following actual examples, given me from your records, are illustrative of some of the results emanating from a strict application of said §443.05(5). The first example is one of minimum eligibility compliance; the others reflect hardship situations certainly not intended by the legislature:

|                   |            |  |
|-------------------|------------|--|
| 1st quarter wages | — \$259.94 | High quarter wages — \$259.94 — Divided by 13 — Average weekly wage, \$20.00 |
| 2nd quarter wages | — \$140.06 | Eligible for ten weeks at \$10 per week. Total available credits, \$100.     |
| Total wages       | — \$400.00 |  |



Weeks worked determined by dividing the total base period wages by the average weekly wage. Total weeks worked in this instance would be 20, applicant eligible.

|                              |  |
|------------------------------|--|
| 1st quarter wages — \$671.66 | High quarter wages, \$671.66; Divided by |
| 4th quarter wages — \$354.81 | 13 — Average weekly wage, \$51.66.       |
| Total wages \$1026.47        |  |

Twenty times average weekly wage — \$1033.40. Claimant does not qualify as he only has total base period wages of \$1026.47.

|                              |  |
|------------------------------|--|
| 1st quarter wages — \$682.21 | High quarter wages, \$682.21; Divided by |
| 4th quarter wages — \$355.80 | 13 — Average weekly wage, \$52.48.       |
| Total wages \$1038.01        |  |

Twenty times average weekly wage — \$1049.60. Claimant does not qualify as he only has total base period wages of \$1038.01.

I am also advised of a claimant having \$12,000 annual income, some \$8,000 of which was received in one quarter, who is ineligible to receive unemployment compensation because 20 times his average weekly wage amounts to \$12,030.

Hence we think it is demonstrated from the above that there was good reason for the legislature having left §443.04(4)(b), *supra*, in the very section of the statute that determines an individual's average weekly wage.

It would be our recommendation that a rule of the Florida industrial commission be adopted which will equate the situation of the irregularly paid employee to that of the regularly paid employee. In order to do this it may not be possible in all cases to determine the average weekly wage of a claimant by dividing his highest wage quarter by 13, or weeks reported for such quarter. I do not believe that the legislature intended that persons otherwise eligible for unemployment compensation benefits should be denied such benefits because of the irregularity of their compensation either in the determination of such compensation or the payment of such compensation.

In addition to the above comments, I point out that the declaration of public policy as appears in §443.02, F. S., states, among other things, that unemployment is recognized as "a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by . . . devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment."

Section 443.20, F. S., requires that the provisions of this chapter be liberally construed to accomplish its purpose.

These sections in connection with §443.04(4)(b), *supra*, in my opinion provide ample authority for the Florida industrial commission by rule and regulation, to resolve the inequitable situation in which irregularly paid employees such as seasonal workers, piece-rate workers and others would be placed if §443.04(4)(b) is disregarded.

In the above opinion I have given you my views based on Ch. 443 considered as a connected whole. I am sure that latitude was intended to allow you rule-making power to equate the situation of otherwise qualified seasonal workers, piece-rate workers and part-time paid workers engaged in insured work, on a basis similar to that of the regularly paid weekly employee. Obviously, however, a different criteria than that prescribed by the legislature for the regularly paid worker should be used in the cases of irregularly paid workers.

The question presented, for the above and foregoing reasons, is answered in the affirmative.

059-153—August 10, 1959

### COURTS

#### CONSTABLES—MILEAGE FEE FOR SERVING PROCESS— §§30.23, 30.17, 30.27, AND 37.16, F. S.

To: Donald "Doc" MacDonald, Constable, Third District, Monroe County, Marathon

#### QUESTION:

What is the mileage fee to which a constable is entitled for serving process?

The question in this instance appears to stem from the provisions of §30.23, which provides in part as follows:

Mileage, distance to be estimated from *courthouse door* to point of execution or process, per mile each way . . .  
\$ .15. (Emphasis supplied.)

"Courthouse" in its colloquial sense has to some persons become synonymous with the phrase "county seat" and the county courthouse is sometimes, simply referred to as "the courthouse." Legally, however, this is not the case. The county seat is technically limited to the boundaries of the municipality designated as the county seat at the time of said designation (*Marengo County et al v. Watkins et al*, 32 So. 669, 670, 134 Ala. 275 (1902); *Rogers v. Wells et al*, 113 So. 524, 216 Ala. 514 (1927) 20 C. J. S. Counties, §§53 and 73, pp. 809 and 831). "The term 'courthouse' is used to designate the building where courts are held, and where the people attending such courts are supposed to congregate." (21 C. J. S. 255, Courts, §166 a.)

In Florida the county courthouse houses the county court, the county records, and in a good number of instances it houses the majority of the other courts within the county. In the event that a constable who serves a district in which the county seat is situated and the office of his justice of the peace is located in the courthouse, there would, of course, be no problem in interpreting §30.23, F. S., as it pertains to the fee to be charged for the service of process by constables. In those cases where the justices of the peace courts are not located in the courthouse, and this is the rule rather than the exception, the places where the justices of the peace regularly hold court must, under the above cited authorities, be the "courthouse"

referred to in §30.23, F. S., quoted above (see 21 C. J. S. 255, Courts, §166 a.)

As just pointed out, the constable's district does not, in the majority of cases, encompass the courthouse, and, therefore, the county courthouse is not a logical beginning or terminal point for which constables might base mileage fees, especially in the light of §30.27, F. S., which provides in part that "No sheriff, constable or coroner shall charge constructive mileage." (Emphasis supplied.) Section 37.16 also indicates that constables are not entitled to mileage traveled beyond the limits of their districts.

It is, therefore, the opinion of this office on the basis of the above cited authorities that the mileage fee to be charged by a constable for the service of process would be for the distance traveled between the justice of the peace court within the district where the process is served and the point of execution and the return trip back to the court of the justice of the peace within the district wherein the process is served. The question set out above is answered accordingly.

059-154—August 10, 1959

#### ESTATE OF DECEDENTS

##### ADMINISTRATION UNNECESSARY, FEES OF COUNTY JUDGE—§735.05(2), 735.06 AND 735.13, F. S.

To: *Monroe W. Treiman, Secretary, Florida County Judges Ass'n, Brooksville*

#### QUESTION:

**Is the county judge entitled to both a flat filing fee and all other fees allowed in connection with probate matters where a petition for an order of administration unnecessary is filed in a testate estate?**

In testate estates a petition for an order of administration unnecessary may be filed only after the will has been probated. Section 735.05(2), F. S. Hence, all fees normally charged by the county judge in connection with the probate of a will are applicable.

Upon the filing of such petition, a hearing is held by the county judge (§735.06) and if after said hearing the county judge is fully satisfied that the estate is entitled to an order of administration unnecessary, said judge shall make and enter such order. The proceedings in connection with a petition for an order of administration unnecessary, although ancillary in nature, must be filed in the same case in which the will was probated (§735.05(2), F. S.). It is for this proceeding that the county judge is entitled to the fee of \$7.50 provided by §735.13, F. S.

It is my opinion that when a petition for administration unnecessary is filed in a testate estate, the county judge shall receive in addition to all other fees allowed in probate matters, a flat filing fee of \$7.50.

The meaning of the term "probate" as used in this opinion is limited to the proceeding pertaining to the proof of the will and is not intended to include other matters relating to the administration of the estate.

059-155—August 10, 1959

**CORPORATIONS AND BUSINESS TRUSTS  
CORPORATION NOT FOR PROFIT—INTERPRETATION OF  
CH. 59-482 (§617.26, F. S.) RELATIVE FEES PRESCRIBED—  
§§15.08 AND 15.09, F. S.**

To: R. A. Gray, Secretary of State, Tallahassee

**QUESTIONS:**

1. Where the legislature made reference in Ch. 59-482 to fees provided for in §15.08, F. S., and there was an apparent clerical error in the reference inasmuch as §15.08 does not directly relate to fees, would it be proper to look to §15.09 which does relate to fees and which was apparently intended in the legislature's reference?

2. Again referring to Ch. 59-482, does §4 thereof provide one fee for filing of an application and another fee for the actual registration of a voluntary health organization?

3. Is a fee to be charged for the filing of a financial statement by a voluntary health organization under the provisions of §5 of Ch. 59-482?

**AS TO QUESTION 1:**

Section 4 of Ch. 59-482 provides:

Each applicant for registration shall pay to the Secretary of State for the filing of its application and for the issuance of the Certificate of Registration provided for by this Act, *the same fee for making a certificate with seal*, as provided by Section 15.08, Florida Statutes. (Emphasis supplied.)

The problem here stems from the fact that §15.08, F. S., provides for the tax on commissions of public officers and makes no provision for a fee to be charged for a certificate with seal.

In *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663 at 665, the Florida supreme court stated:

Speaking more concretely, when the intention can be ascertained with reasonable certainty, *words may be altered* or supplied in the statute so as to give it effect, and to avoid any repugnancy to or inconsistency with such intention. (Emphasis supplied.)

The reference in Ch. 59-482 was apparently to §15.09, F. S., rather than §15.08, F. S., since §15.09 makes specific reference to the fee to be charged for a "certificate with seal." It would appear appropriate in the light of the above quoted decision of the Florida supreme court to follow the apparent intention of the legislature and charge the fee authorized under the provisions of §15.09, F. S.

In the light of the comments and authorities set out above, question 1 is answered in the affirmative.

**AS TO QUESTION 2:**

The legislature is presumed to have knowledge of the rules of grammar (*Florida State Racing Commission v. Bourquardez*, 42 So. 2d 87). It would appear from the singular use of the word "fee" as it appears in §4 of Ch. 59-482 (see section quoted in answer to question 1 above) that only one fee was intended. That fee, in the light of the answer to question 1 above, should be fixed as provided for in §15.09, F. S.



Accordingly, question 2 is answered in the negative.

AS TO QUESTION 3:

There is no provision in §5 of Ch. 59-482 for a fee to be collected from a voluntary health organization for the filing of a financial statement. Inasmuch as the legislature provided fees for other acts to be performed under this chapter, but failed to do so with regard to this particular act; it would appear under the generally accepted rules of statutory construction that no fee was intended (See *Dobbs v. Sea Isle Hotel, Fla.*, 52 So. 2d 341; *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234).

In the light of the above discussion, question 3 is answered in the negative.

059-156—August 10, 1959

**ELECTIONS**

CONDUCTING REGULAR, CONSTITUTIONAL, SPECIAL, REFERENDUM AND SCHOOL ELECTIONS IN CONJUNCTION WITH EMERGENCY CONSTITUTIONAL REFERENDUM AUTHORIZED BY §3, ART. XVII, SJR 660 AND CH. 59-132—SJR 734, HJR 835; §§230.37-230.39 AND 97.021(2) AND (4), F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTIONS:

1. May the constitutional amendments proposed in senate joint resolution 734 and house joint resolution 835, relating to excise taxes and the game and fresh water fish commission respectively, be submitted to the electorate at the special emergency election to be held Nov. 3, 1959, for the purpose of adopting or rejecting senate joint resolution 660 pertaining to legislative reapportionment?

2. May special and referendum elections on special legislative acts relating to county and municipal affairs be held on the same day as the special emergency election referred to in question 1 above?

AS TO QUESTION 1:

Senate joint resolution 734 and house joint resolution 835 both provide that the respective constitutional amendments contained therein shall be submitted to the electors for the state for approval or rejection "at the general election to be held in November, 1960, or at any special general election held prior to that date."

Sections 230.37 through 230.39, F. S., provide for biennial school district elections to be held on "the first Tuesday after the first Monday in November of odd-numbered years" unless another election be scheduled on that date, and in such event the school board may prescribe another date. Under the provisions of the above quoted statute, the next biennial school district election may be held on Nov. 3, 1959, 1959 being an odd-numbered year and Nov. 3 being the first Tuesday after the first Monday in November of such a year. Such an election is not however a general election or a special general election as described in joint resolution 734 or 835.

In senate joint resolution 660 pertaining to legislative reapportionment, the legislature declared an emergency requiring an

early decision by the electors of Florida. Chapter 59-132 authorizing this election provides for a "special election" to be "held within the State of Florida on the first Tuesday after the first Monday in November, which date is November 3, 1959." Such a special election is not a general election as referred to in joint resolutions 734 and 835 in the light of the definition of such elections set out in §97.021(2) and (4), F. S.

Unless the emergency provisions contained in §3, Art. XVII, State Const., are followed, as was the case in senate joint resolution 660 relating to legislative reapportionment, the provisions of §1, Art. XVII, requiring constitutional amendments to be presented at general elections, must be met. The emergency provisions contained in §3, Art. XVII, were not followed in the adoption of joint resolutions 734 and 835, and therefore the constitutional amendments contained therein cannot be voted on at the "special election called for November 3, 1959," for the purpose of ratifying senate joint resolution 660 relating to legislative reapportionment wherein the emergency provisions of §3, Art. XVII were followed.

Accordingly, question 1 as set out above is answered in the negative.

#### AS TO QUESTION 2:

The answer to question 2 will depend to some degree upon the phraseology of the referendum provisions of the various special acts of the legislature which may call for elections to ratify these legislative acts.

Generally speaking however, the provisions of Art. XVII, State Const., referred to in the answer to question 1 above, are not applicable to such elections, and no emergency need be declared to call such an election at any time so long as said election is called during the time which may be prescribed within the referendum provision of the act to be voted on. This being the case, a referendum election could be held on Nov. 3, 1959, the same day on which the election to adopt or reject the constitutional amendment relating to reapportionment will be held, if such date falls within the time prescribed within the referendum provision.

It is to be pointed out however that the various special, referendum and school elections may not be held as a part of or in conjunction with the emergency election on the constitutional question. This does not mean that these elections cannot be held on the same day as the constitutional election, but in those instances where a second election may be scheduled for Nov. 3, 1959, said election should be held separate and apart from the emergency election on the constitutional amendment.

This was discussed in a similar situation in A. G. O. 054-22, 1953-54 biennial report of the attorney general, p. 97, and certain suggestions were made insofar as election procedures are concerned. For the benefit of those election officials who may be concerned with this question, I quote therefrom:

. . . It is, therefore, my opinion that the same officials may be appointed by the county commissioners to preside at the polls in both elections, *provided separate ballots and ballot boxes* (in the event voting machines are used, separate ballots should be provided for each election) *are furnished for the special election* . . . Separate appointment of such officials should be made as to the special election and they should subscribe to a separate oath or af-

firmation as to each election with respect to their duties to be performed as prescribed by law. (Emphasis supplied.)

Question 2 is answered in the affirmative subject to the comments and conditions set out above.

059-157—August 10, 1959

#### CIVIL PRACTICE AND PROCEDURE

ACCEPTANCE OF SERVICE UPON NONRESIDENTS BY SECRETARY OF STATE—§47.30 AS AMENDED BY CH. 59-382

To: *R. A. Gray, Secretary of State, Tallahassee*

#### QUESTION:

Is the secretary of state required to accept service of process and give notice of same under the provisions of §47.30, F. S., as amended by Ch. 59-382?

Section 47.30, F. S., provides in part:

Service of such process *shall* be made by the plaintiff or his attorney by either leaving a copy of the process with a fee of \$2.00 in the hands of the secretary of state, or in his office, or by mailing a copy of such process with a fee of \$2.00 to the secretary of state and such service shall be sufficient service upon a defendant who has appointed the secretary of state as his agent for the service of such process; . . . Proof of service of process on the secretary of state *shall* be by a copy of notice of said secretary accepting such process. (Emphasis supplied.)

It would appear from the provisions of the statute quoted above that if service is to be effected under this section, service upon the secretary of state is mandatory, and therefore the implication would follow that the secretary of state is obliged to accept said process. (See *Amos v. Mathews*, 99 Fla. 1, 126 So. 308; *Girard Trust Co. v. Tampashores Development Co.*, 95 Fla. 1010, 117 So. 786; *Getzen v. Sumter County*, 89 Fla. 45, 103 So. 104).

It further appears from the very last sentence in §47.30, F. S., that proof of service *shall* be by notice from the secretary of state, and therefore this office is inclined to take the position that in order to fulfill the requirements of the law the secretary of state should give notice of the acceptance of said process.

Accordingly, both parts of your question as set out above are answered in the affirmative.

059-158—August 10, 1959

#### CONSERVATION

BOND OF SUB-AGENT FOR SALE OF HUNTING AND FISHING LICENSES—COST—CH. 59-494 (§372.574, F. S.)

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTION:

May the cost of the premium of the bond posted by a sub-agent, pursuant to §2 of Ch. 59-494, be charged as an expense of the office of the county judge?

Chapter 59-494 authorizes county judges to appoint persons, firms, partnerships or corporations as sub-agents for the sale and issuance of hunting, fishing and trapping licenses.

Section 2 of said chapter requires that such sub-agents shall post adequate bond, payable to the county judge in an amount fixed and approved by the judge.

Section 6 of this chapter authorizes the sub-agent to charge a service fee of 25c for the issuance of said licenses and provides that the service charge shall be an additional sum over and above the sum required by law to be collected for the issuance of each license. Thus, the sub-agent's service charge is in addition to the authorized fee of the county judge for the issuance of hunting, fishing and trapping licenses.

Section 8 of the chapter expressly provides that nothing contained therein shall be construed to relieve the county judge of any counties of the state of the duty of issuing hunting, fishing and trapping licenses to the public without the payment of any service charge as required by law.

In view of the above provisions of Ch. 59-494, it is my opinion that the premium on the bond of the sub-agent, may not be charged as an expense of the county judge's office.

059-159—August 10, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
CONSTRUCTION OF §122.08(4) IN LIGHT OF §122.12, F. S.**  
*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Where a member of the state and county officers and employees retirement system, with more than 10 years of creditable service and who has passed the age of 60 years, dies leaving a widow and a daughter, the said daughter having been designated as beneficiary under §122.12, F. S., what are the rights of the widow under §122.08(4), F. S.?**

The member in question, being then a member of the state retirement system, on Jan. 24, 1948, designated his wife as beneficiary (see §121.10, prior Florida Statutes,) but on Feb. 1, 1955, revoked the designation of his wife as beneficiary and named his daughter beneficiary in lieu of his wife. Recently said member died after having reached the age of 60 years and having accumulated more than 10 years of creditable service under the retirement acts. The daughter remained his designated beneficiary of record at the time of his death. It appears, therefore, that the said member after becoming "eligible for retirement" continued to be employed by an agency of the state within the purview of §122.08(4), F. S.

Said subsection (4), in so far as here material, provides that "any state or county officer or employee who becomes eligible for retirement and continues to hold office or be employed shall be construed to have selected the option herein which will afford the surviving spouse the greatest amount of benefits. Should such officer or employee die before retiring, his surviving spouse shall be entitled to receive either the accumulated contributions of such officer or employee at the date of death or the reduced retirement compensation to which the surviving spouse would have been entitled under such option, calculated on the assumption that such officer or employee retired on the date of his death . . ." The above provision was new in 1957 (§5, Ch. 57-363); prior



thereto the option was given to the member to select one of the options mentioned. Under the 1957 amendment should the member fail to make the selection the statute makes it for him if otherwise qualified. Prior to the 1957 amendment any state or county officer or employee who became eligible for retirement and continued to hold office or be employed was authorized to select one of the options mentioned in §122.08(4), F. S., but had to make the selection for it to be effective; but since the 1957 amendment if the officer or employee fails to make the selection the statute makes it for him in case of death without having made the selection.

Section 122.12, F. S., provides that "any officer or employee may file, in writing, a designation of beneficiary and it shall be the duty of the comptroller to refund one hundred per cent, without interest, of the contributions made to the retirement fund by such deceased officer or employee to such designated beneficiary . . . Upon failure to designate a beneficiary, the refund shall be made in the same order as designated in section 222.15," F. S. It is clear from a reading of Ch. 122, F. S., in its entirety, that it was not the intention of the legislature that said section would authorize or permit the comptroller to make refunds of contributions of all members of the retirement system designating beneficiaries, who continue in office or employment after becoming "eligible for retirement" and who are married persons, so as to be within the purview of §122.08(4), F. S. Under said subsection such officers or employees are "construed to have selected the option herein (subsection 4) which will afford the surviving spouse the greatest amount of benefits" which benefits are to be "calculated on the assumption that such officer or employee retired on the date of his death." In law we have here an employee who at the time of his death was a retired employee for the purposes of said §122.08(4), F. S.; with the same statute giving to the widow the option of receiving "either the accumulated contributions of such officer or employee at the date of his death or the reduced retirement compensation to which the surviving spouse would be entitled to under such option . . . ." Although one of the elections of the widow is to take the accumulated contributions, in lieu of the reduced retirement compensation, such accumulated contributions are not the contributions mentioned in §122.12, F. S., but in law a lump sum retirement compensation measured by the amount of the contributions made by the member of the retirement system. Section 122.12 contemplates a return of contributions where there is no retirement either actually or in contemplation of law; §122.08(4), contemplates a retirement compensation, although the lump sum amount is measured by the amount of the contributions.

You are, therefore, advised that under the circumstances presented the widow of the employee in question, because of the presumption raised by the statutes of retirement on the date of death and also the selection by the statute of the "option which will afford the surviving spouse the greatest amount of benefits," is entitled to the benefits therein provided. This being true the daughter, there having been a retirement under the statute, takes nothing under the designation provided by §122.12, said designation being effective only in cases where there is no retirement of

the officer or employee, either actually or under statutory presumption.

These observations seem to answer your inquiry.

059-160—August 11, 1959

### LIQUORS AND BEVERAGES

LICENSES, QUALIFICATIONS REQUIRED—ISSUANCE TO CONVICTED FELON, RECEIPT OF UNCONSTITUTIONAL PARDON—§§561.15(1), (2) and 562.27, F. S.

To: L. Grant Peebles, Director, State Beverage Department, Tallahassee

#### QUESTION:

**May a convicted felon who has received a full and unconditional pardon be granted a license to sell or distribute alcoholic beverages in Florida?**

The matter of licensing wholesale and retail liquor dealers is governed by the following provisions of §561.15(1) and (2), F. S.:

(1) *Licenses shall be issued only to persons of good moral character, who are not less than twenty-one years of age. Licenses to corporations shall be issued only to corporations whose officers are of good moral character and not less than twenty-one years of age. There shall be no exemptions from the license taxes herein provided to any person, association of persons or corporation, any law to the contrary notwithstanding.*

(2) *No license under the beverage law shall be issued to any person who has been convicted within the past five years of any offense against the beverage laws of this state, or who has been convicted in the last past fifteen years of any felony in this state, or has been convicted in any other state or the United States of an offense designated as a felony by such state or the United States, or to a corporation, any one of whose officers has been so convicted. The term "conviction" shall include an adjudication of guilt on a plea of guilty or nolo contendere, or the forfeiture of a bond when charged with a crime. (Emphasis supplied.)*

A person who was convicted of a felony more than 15 years ago is not barred by said subsection (2) from obtaining a license to sell or distribute alcoholic beverages in this state, regardless of whether he has received a pardon or not. Therefore, the comments which follow will relate to a person who has been convicted of a felony within the contemplation of said subsection (2) within the 15 years next prior to the consideration of his application for a license.

In *Singleton v. State*, 21 So. 2d 22, the supreme court of Florida, speaking of the effect of a full and unconditional pardon, said:

*It is settled law that the pardon of an offense not only blots out the crime committed, but removes all disabilities resulting from the conviction. (Emphasis supplied.)*

In *Marsh v. Garwood*, 65 So. 2d 15, text 19, the said supreme court stated that:

*When extended to a convict in prison, a full pardon relieves him of the remaining punishment and removes his*

*disabilities; when granted after his time in prison has expired, it removes all that is left of the consequences of conviction—his disabilities, and restores him to his customary civil rights, which are generally recognized as the right to hold office, to vote, to render jury service, and to be a witness. (Emphasis supplied.)*

And as late as *Fields v. State*, 85 So. 2d 609, text 610, decided in 1956, our supreme court took note of:

... the rule of penal law repeatedly expressed in opinions of this Court that *a full and unconditional pardon "removes all that is left of consequences of conviction."* (Emphasis supplied.)

I am of the opinion that the statutory bar of said subsection (2) against the issuance of a beverage license to a person who has been convicted of a felony within the last 15 years is one of the consequences of his conviction of such felony, one of the disabilities which results therefrom. Therefore, I think that bar is removed by a full and unconditional pardon and that said subsection (2) no longer stands in the way of the issuance of a beverage license to the pardoned person.

That is not to say, however, that a conviction of a felony for which the offender has received a full pardon, together with the facts and circumstances surrounding the crime, should not be considered for whatever light may be thrown thereby upon the question of whether the pardoned person meets the requirement of §561.15(1) that he have "good moral character" in order to obtain a license.

In *State v. Snyder*, 187 So. 381, text 382, the supreme court of Florida ruled that a full and unconditional pardon did not stand in the way of disbarring an attorney for an embezzlement for which he had been convicted. In that case the court said:

*The pardon does not blot out the fact of having committed the crime for which disbarment is imposed and was no part of the punishment for it. (Emphasis supplied.)*

In *Page v. Watson*, 192 So. 205, our supreme court held that a physician's medical license could be revoked because of his felony conviction even though he had received a full and unconditional pardon, and, in so holding, the court quoted approvingly from 46 C. J. 1192, 1193, par. 39, as follows (Text 208):

When a full and absolute pardon is granted, it exempts the individual upon which it is bestowed from the punishment which the law inflicts for the crime which he has committed. The crime is forgiven and remitted, and the individual is relieved from all of its legal consequences. The effect of a full pardon is to make the offender a new man. While a pardon has generally been regarded as blotting out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense, *it does not so operate for all purposes* and as the very essence of a pardon is forgiveness or remission of penalty, *a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said; it involves forgiveness and not forgetfulness. (Emphasis supplied.)*

Since a full pardon does not blot out the fact of having committed the crime and the fact of having been convicted thereof,

and does not wipe out the moral stain, I see no reason why the conviction should not be considered after pardon in determining whether an applicant for a beverage license is presently possessed of good moral character. In considering the effect of a pardoned conviction upon good moral character, it should be recognized that convictions of some types of felonies show a greater lack of good moral character than convictions of certain other types of felonies. For example, §562.27, F. S., makes it a felony to possess a still designed or adopted for the manufacture of an alcoholic beverage containing more than 1% of alcohol by weight, unless such possession is by or for a licensed manufacturer, but it could not be seriously contended that the commission of such an offense evidences a lack of good moral character to the same extent as the commission of larceny, robbery, murder or rape, all of which are likewise felonies. Also, I think that a pardoned applicant should be permitted to offer such excuse for the commission of the felony as may be available to him, if any. Too, he should be permitted to show, if he can, that despite such moral stain as may have resulted from the commission of the felony he has rehabilitated himself and is presently of good moral character. Any such excuse or showing of rehabilitation should, of course, be subject to rebuttal and should be given only such effect as it merits.

Therefore, my conclusions are as follows:

1. A full and unconditional pardon removes the bar to receiving a beverage license which is set up by §561.15(2) against a person who has been convicted of a felony within the last 15 years.

2. In determining whether a pardoned felon possesses the good moral character required by §561.15(1) as a prerequisite to the issuance of a beverage license, the fact of the conviction should be considered, along with the facts and circumstances surrounding the crime, any excuse or evidence of rehabilitation which he may offer and any evidence in rebuttal thereof, and any other pertinent evidence.

059-161—August 17, 1959

**REGULATION OF TRADE, COMMERCE & INVESTMENTS**  
**MORTGAGE BROKERAGE ACT, §4(1) CH. 59-309 (§494.04(12),**  
**F. S.)—SURETY BONDS REQUIRED**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

May there be incorporated in the surety bond required of a mortgage broker, under §4(1), Ch. 59-309, a statement of maximum liability of \$5,000?

Under said §4(1), Ch. 59-309, mortgage brokers within the purview of the said act are required to "deposit with the commissioner prior to doing business as such, a bond in the amount of five thousand dollars . . . conditioned upon the faithful compliance of the broker so licensed with the provisions of" said Ch. 59-309, which bond "shall run to the state for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the broker" or any of his solicitors. (Emphasis supplied.) The bond so required is in the penal sum of \$5,000. The term of licenses under this act "expire the last day of August next following the date of its issuance." Licenses seem to be renewed upon the payment of a renewal fee as provided in and by the statute.



"The object of a penalty in a bond is to limit the obligation of the signers, and in the absence of a condition extending his liability a surety cannot be held liable for more than the penal sum named." (11 C. J. S. 432, §57). "The general rule is that in an action on a penal bond with collateral conditions, no recovery can be had in excess of the amount named as the penalty. . . ." (11 C. J. S. 511, §132). In other words the maximum liability under a bond required by Ch. 59-309 is \$5,000 for the bond term; that is, the period ending on the last day of August next following its effective date. Bonds or renewal bonds for renewal license periods must be for the full \$5,000 required, notwithstanding any liabilities that may have been paid thereunder for the previous license term. This because new bond obligations, (whether a new bond or the renewal or extension of an existing one is furnished) are renewed annually to procure renewal licenses. For a surety to incorporate in the bond a statement that the maximum liability under the bond is \$5,000, although a correct statement of the law as to each separate period, might be misleading where the bond extends through two or more years, through renewals or extensions instead of the issuance of new bonds.

The above stated question is, therefore, answered in the negative unless the statement used makes it clear that it is not to be applied to the life of a bond renewed and extended by agreement and payment of the fee, but to each annual period as a separate bond obligation. These observations seem to answer the above stated question.

059-162—August 19, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
MORTGAGE BROKERAGE ACT, CH. 59-309 (CH. 494, F. S.)—  
§§687.02 AND 687.03, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

May a mortgage broker, duly licensed under Ch. 59-309 collect the brokerage fees and commissions therein provided without subjecting the lender to the usury statutes, when: (1) he is lending his own funds, or (2) funds of his wife, a relative or a corporation of which he is an officer or stockholder, or (3) acts strictly as a broker under said act for another?

Under §687.02, F. S., "all contracts . . . for the payment of interest upon loan, advance of money, or forbearance to enforce the collection of any debt, or upon any contract whatever at a higher rate of interest than ten per cent per annum," are declared to be usurious, except where otherwise expressly provided by statute, as for example under the small loan statutes, discount consumer financing statutes, etc. However, for borrowing corporations the usury rate is interest in excess of 15% (§687.03, F. S.). Under said §687.03, it is declared to be "usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon the obligation of a corporation, a rate of interest greater than ten percent per annum, either directly or indirectly, by way of commission, for advances, discounts, exchange,

or by any contract, contrivance or device whatsoever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten percent," except as to corporations in which case the rate is fifteen percent.

Chapter 59-309 regulates the mortgage brokerage business in this state. It is intended as a regulatory statute for the protection of the public. It makes no change, either directly or indirectly, in the usury statutes of this state. Under this statute a *mortgage broker* is defined as a person "who for compensation or in the expectation of compensation, either directly or indirectly makes, negotiates or offers to make or negotiate a mortgage loan" for another. A broker has been generally defined as "one who is engaged for others, on a commission, to negotiate contracts relative to property with the custody of which he has no concern" (12 C. J. S. 5, §1). A broker has been distinguished from an agent, "in that a broker holds himself out for employment by others, and acts as an intermediate negotiator between the parties to a transaction, and in a sense is the agent of both parties, whereas the element of exclusiveness of representation of the principal by which he is employed enters into the employment of an agent." (12 C. J. S. 8, §3). "A broker to whom a client makes application for a loan is generally the agent of the borrower or mortgagor and not of the lender or mortgagee" (12 C. J. S. 37, §14), although a lender might in some cases use a broker to locate borrowers.

The term, mortgage loan, as used in said Ch. 59-309, "means any loan secured by a mortgage on real estate located in the State of Florida" subject to certain exceptions not here material. This definition seems to exclude from the operation of said Ch. 59-309 loans secured by chattel mortgages. Generally "a lender cannot be charged with usury on account of any commission or bonus paid by the borrower to his own agent, or to an independent broker, for services in negotiating or procuring the loan" (*Shaffran v. Holness*, Fla., 102 So. 2d 35, text 39 and 40). "When one negotiates a loan through a third party, with a money lender, and the latter, bona fide, lends the money at a legal rate of interest, the contract is not made usurious merely by the fact that the intermediary charges the borrower with a heavy commission; the intermediary having no legal or established connection with the lender, as agent." (Annotation in 52 A. L. R. 2d 703, text 708; quoted in *Shaffran v. Holness*, supra, at 39). Where the services for which the mortgage broker is compensated are not such as the lender should have paid, and the broker's compensation is not shared or agreed to be shared, either directly or indirectly, with the lender, compensation paid a mortgage broker should not be considered as interest within §§687.02 or 687.03, F. S. (see *Richter Jewelry Co. v. Schweinert*, 125 Fla. 199, 169 So. 750, text 757). A lender will not be permitted to cloak usurious extractions beneath charges for pretended services to the borrower. Most courts hold that where a part of a brokerage commission is paid to the lender as an inducement to make the loan the transaction becomes usurious (Annotation in 52 A. L. R. 2d 725); however, intent to obtain usurious interest may be an element to be considered in this state (*Pushee v. Johnson*, 123 Fla. 305, 166 So. 847). In *Speier v. Monnah Park Block Co.* Fla., 84 So. 2d 697, the interest paid the lender was combined with commissions paid lender's agent in connection with the loan as a

basis for holding that the usury statutes had been violated under the particular circumstances.

From the above and foregoing authorities and observations the above stated question should be answered in the negative where the broker is lending his own money, if such a representation is legally possible, and in the affirmative where the broker is acting strictly as such, without any other collateral connection. Where a broker represents a borrower in connection with a loan being made by his wife, a relative or a corporation of which he is an officer or stockholder, the particular circumstances become material. If the broker is in fact acting as agent for the lender instead of the borrower, or there is a financial benefit flowing to the lender, either directly or indirectly, through the actions of the broker which, when added to the interest charged, which results in a benefit in excess of legal interest, there will be a violation of the usury statutes. The lender is not entitled to compensation in excess of the amount allowed by the usury statutes, either directly or indirectly, from the borrower.

059-163—August 19, 1959

#### CORRECTION SYSTEM

PAROLE—ELIGIBILITY FOR PAROLE—ESCAPED PRISONER  
ABSENT FROM STATE—§947.16(1) AND 947.17(5),  
(6), F. S.

To: Francis R. Bridges, Jr., Florida Parole Commission, Tallahassee

#### QUESTION:

Has the Florida parole commission the authority to grant a parole to Fred Stokes, #18035; Ala. 26314, who began serving a life sentence in Florida state prison on Feb. 28, 1927, escaped therefrom on Aug. 20, 1930, shortly thereafter became involved in a murder charge in Alabama, and on June 13, 1932, began serving a 50-year sentence in that state? In other words, has the Florida parole commission the authority to parole a prisoner who is absent from the state prison on escape?

Section 947.16(1), F. S., dealing with the eligibility of a prisoner for parole reads:

*Every person who has been, or who may hereafter be convicted of a felony or one who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences total twelve months or more and confined in a jail or prison in this state in execution of the judgment of the court thereof and who has served not less than six months of such term, and in cases where the term is eighteen months or less, has served not less than one-third of his term, and whose prison record is good, shall be eligible for consideration by the commission for parole. (Emphasis supplied.)*

Under this statute, a person is not eligible for parole unless his prison record is good. In my opinion, a convict's prison record is far from good when the final chapter thereof consists of an escape, which is not only misconduct of an extremely serious nature, but is also a felony.

Moreover, it will be noted that said statute renders a prisoner eligible for parole only when he "has been or may hereafter be con-

victed . . . and confined in a jail or prison in this state in execution of the judgment of the court. . . ." I think that these words, when construed with the other statutes which are hereinafter mentioned, contemplate that a prisoner must be in confinement in Florida in order to be eligible for a Florida parole.

Section 947.17(5) and (6), F. S., dealing with the procedure in granting paroles, reads as follows:

(5) Thereafter, upon consideration, the commission shall make its findings and determine whether or not such person shall be granted a parole and the terms and conditions thereof, *of which determination such person and the prison official having him in custody shall be notified.*

(6) *If such person is granted a parole, the prison official having such person in custody shall, upon notification thereof, inform him of the terms and conditions of such parole and shall in strict accordance therewith, release such person. If such person is indigent at the time he is placed on parole, which fact may be determined in advance by the commission, he shall be given his transportation by the nearest route to the destination noted in the parole. In addition thereto he shall be given a suit of clothes, one pair of shoes, a hat, a suit of underclothing, not to exceed in value in the aggregate, the sum of fifteen dollars, and ten dollars in cash, the cost of which shall be payable by the state as other expenses of the administration of the state prison are paid.* (Emphasis supplied.)

When said subsections (5) and (6) speak of "the prison official having him in custody" and "the prison official having such person in custody," they refer to a Florida prison official and not to a prison official in another state. Therefore, when said subsection (6) provides that a parolee be released by the prison official having him in custody, it requires such release to be by a Florida prison official in the state. The net result is that a person may not be paroled while he is absent on escape.

Moreover, I note that said subsection (6) mandatorily requires that an indigent parolee be furnished certain transportation, clothes and money at the expense of the state. The legislature did not intend that these items should be furnished at state expense when the prisoner is not in custody in Florida. According to the statute, they must be furnished to every indigent person who is paroled by the Florida parole commission. Therefore, it appears that the legislature did not mean to authorize the parole of a person who is not in custody in Florida.

Consequently, your question is answered in the negative.

059-164—August 20, 1959

#### LABOR

LABOR UNIONS—ORGANIZATION AND SOLICITATION OF MEMBERS FROM STATE, COUNTY OR MUNICIPAL EMPLOYEES PROHIBITED—CH. 59-223 (§839.221, F. S.)

To: Darray A. Davis, County Attorney, Dade County, Miami

QUESTION:

May labor unions, which under their constitution assert the right to strike, organize and solicit membership of public employees of the state, county or municipality?



In order to resolve this question, we must construe it in the light of Ch. 59-223 which reads:

Section 1. *No person shall accept or hold any office, commission or employment in the service of the state, or any county or of any municipality, who:*

(1) *Participates in any strike or asserts the right to strike against the state, county or any municipality; or*

(2) *Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.*

Section 2. All employees who comply with the provisions of this act are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this act, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization. (Emphasis supplied.)

\* \* \*

The above question appears to resolve itself into two basic problems: (1) The determination of whether public employees may be excluded from union participation, and (2) if so, in light of Ch. 59-223, to what extent is such exclusion permissible?

Unlike employees in private industry, public employees usually do not possess full rights of collective bargaining, the right to strike, the right to picket, or the right to a "closed shop" or closed union (31 A. L. R. 2d 1155, 1159, 1161, 1170 and 1172). The status of government employees, whether national, state, county or municipal, is radically different from that of employees engaged in private business or industry. The right of public employees to join a union appears to be limited generally to membership in a union which bars strikes and does not seek to bargain collectively for public employees, but seeks merely to represent its members in the presentation of grievances connected with their employment. The objection to public employees being members of labor unions generally loses its force where the union is governed by a no-strike clause in its constitution and does not purport to bargain collectively (Beverly v. Dallas, 292 SW 2d 172, 31 Am. Jur. 429).

Chief among the reasons advanced by the courts in denying the right of public employees to engage in union activities are the sovereignty of the public employer; the fact that the government is established by and run for all of the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable to the public interest. (U. S. v. United Mine Workers, 330 U. S. 258).

The right of private employees to organize and bargain collectively for lawful purposes is recognized as a matter of public policy in Florida. Chapter 21968, 1943, expressly authorizes private

employees to organize themselves, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Also to be considered in this respect is the right guaranteed to employees (held to be limited to private employees in case of *Miami Water Works Local 643 v. City of Miami*, 26 So. 2d 194) under §12, Declaration of Rights, State constitution, which, insofar as is pertinent to the questions involved herein, is as follows:

The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

While these constitutional and statutory provisions appear to guarantee all employees the right to bargain collectively through a labor union, the supreme court recognized the *basic distinction* existing between public employees and private employees, and held that such constitutional and statutory guarantees were meant to be operative only in the field of private business and industry, and not in government. The court in *Miami Waterworks Local No. 643 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194, 165 A. L. R. 967 stated:

... We think that a careful consideration of the statute reveals that it was meant to be operative only in the field of *private business and industry*. It contains no expression of purpose to regulate employment in government ... The Statute authorizes collective bargaining. It deals with striking and picketing. These terms are entirely familiar terms in today's pattern of economic and industrial strife in the field of *private enterprise*, but they are strange and incongruous terms when attempted to be squared with the governmental process as we know it ... The City of Miami is a governmental entity created by the state. It derives its powers and jurisdiction from the sovereign authority ... Its objects are governmental, not commercial. Created for public purposes only, it has none of the peculiar characteristics of a *private enterprise* maintained for the purposes of private gain. Hence, it has "no business and industrial enterprise" for its employees to "walkout" of. It has no "area of industry" within which, or without which, picketing may or may not be lawful. It has no authority to enter into negotiations with the labor union, or any other organized group, concerning hours, wages, or conditions of employment, and to make such negotiations the basis for fiscal appropriations ... it would seem that a strike against the city would amount, in effect, to a strike against government itself—a situation difficult to reconcile with all notions of government.

The appellant next submits that the right of collective bargaining is given the appellant union under Section 12, Declaration of Rights of the Constitution, and that the court should declare that such section is binding upon the municipality ... We have seen that Chapter 21968, *supra*, does not give the union the right to bargain collectively with the City. Neither is the right given by the *National*

*Labor Relations Act*, as under the statute the United States and all states and political subdivisions thereof are expressly exempted from its operation . . . Section 12, Declaration of Rights, therefore, is not applicable (to government). (Emphasis supplied)

\* \* \*

Thus, it is the established public policy in Florida that public employees and labor unions do not have any right to bargain collectively, to picket, or to strike against government, whether the government involved is state, county or municipal in character. Government has no power or authority to recognize any labor union as the representative of the employees of such government, or to bargain collectively or negotiate with any labor organization concerning hours, wages or conditions of employment, or to make such negotiations the basis for fiscal appropriations. The governmental budget governing the levying and expenditure of taxes must be predicated upon consideration of public interest and welfare, rather than upon negotiations arising from the demands of a labor union.

The distinction between public and private employees has also been recognized in federal legislation. The national labor relations act of 1947 (NLRA) provides that such act shall have no application to federal, state or municipal employees. This act declares it to be unlawful for any person employed by the U. S., or any agency thereof, to participate in any strike, and provides that any individual who strikes shall be discharged immediately and forfeit his civil service status. The appropriations act of congress provided that no part of any federal appropriation should be used to pay the salary or wages of any person who participates in a strike against the government, or who is the member of any labor organization that asserts the right to strike against the government.

From a national standpoint, as previously mentioned, congress has consistently excluded public employment from the operation of its labor relations statutes enacted under the commerce or war power. The NLRA which secures the right to collective bargaining to employees of employers engaged in interstate commerce expressly provides that the term "employer" as used in the act does not include the U. S. or any state or political subdivision thereof.

The labor relations acts of several states expressly exclude public employees from their provisions relating to collective bargaining, and it has been held that such discrimination does not constitute a violation of equal protection (*State v. Brotherhood of Railroad Trainmen* (1951), 232 P. 2d 858).

To some extent, the right of government employees merely to belong to a labor union is granted by statutes and regulations in states other than Florida with the proviso that membership will not vest the right to strike against the government. The civil service act in effect gives this right to the employees coming under the act. The postal department also has permitted union organization of its employees, but this participation has in no instance been extended to include the right to strike or bargain collectively.

In view of the foregoing, we must conclude that in Florida public employees enjoy the right to join or to participate in union activities so long as the union does not, either directly or indirectly, strike, picket, or seek to enforce collective bargaining, or the right to a closed shop or a closed union or assert the right to strike, picket or bargain collectively, but restricts itself to the representa-

tion of its members in the presentation of petitions and grievances connected with employment.

Therefore, as to the first mentioned problem, it appears to be a well settled principle that public employees generally do not have the right to join, organize, or participate in union activity to the extent that they are placed in a bargaining position as in private industry. The interpretations set forth by the Florida courts as well as authorities from other states indicate that public employees may generally be excluded from labor unions. The Florida legislature however has seen fit to allow the organization of government employees by those organizations which do not assert the right to strike. (Ch. 59-223.)

The existence of the right to strike is almost as dangerous to government as the actual strike itself and is not compatible with our democratic principles of government. The existence of a strike clause in the constitution of the organizing union may manifest itself into an ominous threat capable of destroying our principles of government.

The Florida legislature, recognizing the above facts and reasoning that the assertion of the right to strike is but little less ominous than an actual strike, prohibited by Ch. 59-223 not only the right of government employees to strike, but specifically prohibited membership in unions which assert the right to strike. The only reasonable test as to the assertion of the right to strike would appear to me to be whether the power to strike is guaranteed to the union by its constitution. In view of the accepted practice of unions to enforce their demands by the use of strikes, the silence of a union constitution upon the subject would leave open the question of whether the right to strike was actually asserted, especially since such right is considered concomitant with union existence.

This test is also applicable to the parent or controlling union, as they can dominate and control the activities of the various local unions.

Article 12 of the constitution of the teamsters union asserts the right to collective bargaining and to strike. This section is in direct conflict with Ch. 59-223, and in my opinion, brings the teamsters union directly within the contemplation of this law. The right to strike as asserted in their constitution is very plain and unmistakable in its intent. As long as the teamsters' constitution contains this section, they may not organize or solicit membership of public employees of the state, county or municipality. I am also of the opinion that any person who holds any office, commission or is in any way employed in the service of the state or any county or any municipality, who belongs to or has membership in any organization of governmental employees which has a similar provision in the constitution of the parent organization, are subject to dismissal by the proper authority.

The resolution of the executive board of local 237 not to strike and the telegram of general president James Hoffa affirming this resolution are of no legal effect as long as the constitution of the teamsters union from which they derive their powers provides the right to strike. A power cannot rise above its authorized source. The constitution of the brotherhood of teamsters is controlling.

Labor unions have jealously guarded the rights of labor and exerted every effort to secure for labor its just share of the profits accumulated under our system of private enterprise. This service, though of great value in private industry, does not apply with equal



effect as to government employees. There is no profit to divide and few rights to protect as the public employee owes undivided allegiance to his public employer. The government employee, although many times underpaid, must be compensated on the basis of service rendered and the availability of public funds, and not on the basis of a figure agreed upon through collective bargaining.

In view of the severity of the penalty for the violation of the provisions of Ch. 59-223, this office must construe the act so as to protect the employee from any possibility of failing to comply with its provisions. The act would seem to allow no discretion on the part of governmental employers but to immediately discharge any employee found to be in violation of any of its several provisions. For these reasons, I construe the Florida act to prohibit membership by any government employee in any labor union whose constitution does not specifically prohibit as to such employees the right to strike, the right to picket, the right to collectively bargain, the right to a closed shop or the right to a union shop. I further construe the act to recognize the basic premise that one cannot do indirectly what cannot be done directly. Therefore, the act prohibits government employee membership in any labor organization which asserts against the governmental employer the right of secondary boycott, or which requires the employee to respect picket lines which affect his governmental employer; or which employs any other basic strike weapons against the public employer, or which uses union funds to support any strike weapon against such employer. Nor does the Florida act authorize a public employee because of his union membership to directly or indirectly participate in any strike or boycott of his union against any private employer, or permit him to use his union membership as an excuse or justification for failing or refusing to provide any governmental service or to perform any governmental duty for any private employer.

There appears to me to be no doubt as to the legislative intent of Ch. 59-223. The legislature indicated in no uncertain terms that, while government employees may enjoy the right along with private employees of union membership and participation in union activities, this right is subject to the most stringent limitations and as limited must be adhered to without deviation. The organizing of government employees is such a radical departure from the now accepted norm that the legislature has approached it with extreme caution. This point is raised in view of the fact, as reported to me, that most unions will have to amend their constitutions in order to comply with the provisions of Ch. 59-223. The various unions should carefully examine the question and the gravest consideration should be given by them to the advisability of making such an amendment. All formalities in making such a constitutional change should be carefully followed so that opportunity will be afforded for full and complete consideration by the union membership.

Actually, because of the grave responsibilities involved, any union would be well advised before proceeding to bring public employees within its fold to consider the pronouncement of the New York Court in *Railway Mail Ass'n v. Murphy*, 44 N.Y.S. 2d 601, wherein the court said:

To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to

public welfare than to admit hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizens. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.

The reasons are obvious which forbid acceptance of any such doctrine. Government is formed for the benefit of all persons, and the duty of all to support it is equally clear. Nothing is more certain than the indispensable necessity of government, and equally true, that unless the people surrender some of their natural rights to the Government it cannot operate. Much as we all recognize the value and the necessity of collective bargaining in industrial and social life, nonetheless, such bargaining is impossible between the Government and its employees, by reason of the very nature of Government itself. The formidable and familiar weapon in industrial strife and warfare — the strike — is without justification when used against the Government. When so used, it is rebellion against constituted authority.

The court said further:

Collective bargaining has no place in government service. The employer is the whole people. It is impossible for administrative officials to bind the Government of the United States or the State of New York by any agreement made between them and representatives of any union. Government officials and employees are governed and guided by laws which must be obeyed and which cannot be abrogated or set aside by any agreement of employees and officials.

The court in closing said:

To hold otherwise would be to sanction control of governmental functions not by laws but by men. Such policy if followed to its logical conclusion would inevitably lead to chaos, dictators and the annihilation of representative government.

From the above statutes and authorities, we must conclude that governmental employees have the limited right to join unions, and said unions have the right to represent their members as restricted above; that is, without the right, either directly or indirectly, to strike, picket or collectively bargain. We also conclude that public employees cannot strike or be members of labor organizations that assert the right to strike, and the only reasonable test as to whether a given union "asserts the right to strike" is whether or not the power to strike is guaranteed to the union by its constitution.

For these reasons, your question is respectfully answered in the negative.

059-165—August 21, 1959

**SCHOOL CODE****COUNTY SCHOOL SYSTEM—SELECTION OF PERSONNEL—  
DUTY OF DISTRICT—TRUSTEES AND COUNTY BOARD—  
§§231.01(6), 230.43(2) AND 230.23(5)(b), (d), F. S.***To: Thomas D. Bailey, State Superintendent of Public Instruction,  
Tallahassee***QUESTIONS:**

1. Would §231.01 (6), F. S., under "other persons" include the following positions:

Bus mechanic  
General maintenance repairman  
Lunchroom manager  
Lunchroom workers  
Janitors and assistant janitors  
Secretaries to the principals?

2. Does §230.43 (2), F. S., provide for the trustees to recommend personnel to fill the positions listed above?

3. If the answer to question 2 is in the negative, what is the proper procedure for filling these positions?

**AS TO QUESTION 1:**

Section 231.01, F. S., provides:

*Terminology.*—As used in this chapter the term "personnel" refers to the county superintendent and to any person employed by the county board and comprises the following:

(1) ADMINISTRATIVE PERSONNEL—as defined in §228.041.

(2) INSTRUCTIONAL PERSONNEL—as defined in §228.041.

(3) ATTENDANCE ASSISTANTS—includes those persons employed by the county board to assist in any phase of attendance work.

(4) HEALTH ASSISTANTS—includes nurses, physicians, and others engaged in any phase of school health work other than instruction.

(5) TRANSPORTATION PERSONNEL—includes all persons involved in the operation or maintenance of school busses, or assisting otherwise in transporting pupils to school.

(6) OTHER PERSONNEL—includes all other employees of the county school system.

From the foregoing, it would appear that all persons employed by the county school board in whatever capacity, not otherwise designated within a particular class of employee would come within the above definition of "other personnel."

Therefore, question 1 is answered in the affirmative, with the exception of the school bus mechanics or maintenance men who are specifically included within subsection (5) of the above terminology.

**AS TO QUESTION 2:**

Section 230.43, F. S., provides:

The specific powers of the trustees, which shall be exercised by the trustees of any district only when acting

as a body, shall be the following:

. . . To consider recommendations of the supervising principal or the principals of the schools in the district and the county superintendent regarding the nomination of teachers and other members of the instructional staff to serve in the schools and to make nominations for such positions to the county board; . . .

The 1955 legislature amended this provision so as to eliminate its former reference to personnel other than instructional.

Your question is therefore answered in the negative.

Opinion of the attorney general 049-138, based on the original statute, is hereby rescinded to the extent it conflicts with the instant opinion.

#### AS TO QUESTION 3:

The answer to this question is provided by §230.23, F. S., relating to the powers and duties of the county board, provides in subsection (5) (b) that the board shall act on the written recommendations submitted by the county superintendent for persons to act as administrative, supervisory, attendance or health assistants, his office assistants, and bus drivers, and appoint persons to fill such positions.

In subsection (5) (d) of said section, the law provides that the board shall act not later than six weeks before the close of school during any year on the nomination by the county superintendent of supervising principals or principals; act not later than four weeks before the close of school during any year on the nominations by the county superintendent of all other members of the instructional staff; and act on the nomination by the county superintendent of all other employees in such schools. The county board may reject for cause any supervising principal, principal, or other member of the instructional staff, or other employee nominated, and in case the second nomination by the county superintendent for any position be rejected, the said county board shall then proceed on its own motion to fill such position.

The above cited statutory provisions appear to answer question 3.

059-166—August 21, 1959

#### COURTS

EFFECT OF CH. 59-869 (POPULATION ACT APPLICABLE TO DUVAL COUNTY) ON COMPENSATION OF THE CLERK OF THE CRIMINAL AND CIVIL COURTS OF RECORD OF DUVAL COUNTY FOR YEAR 1959

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. Is the annual salary provided by Ch. 59-869 payable to the clerk for the entire year 1959, or from the effective date of the act?

2. If the answer to question 1 is that the salary provided is payable for the entire year 1959, should it be paid from May 28, 1959, by the board of county commissioners, or retained from the net income of the office?

#### AS TO QUESTION 1:

Section 1(3) of Chapter 59-869 provides:



The annual salary of said clerk shall be Eleven Thousand Two Hundred Dollars.

Section 6 of this chapter provided:

Section 1 of this act shall take effect immediately upon becoming law; all other sections of this act shall take effect on January 1, 1960.

Chapter 59-869 was filed in the office of the secretary of state on May 28, 1959. It became a law on that date even though some of the provisions did not become operative until a later date.

A superficial reading of sections 1 and 6 might convey the impression that since no attempt was made to break down the annual salary into monthly payments, it was intended that the increase apply to the entire annual salary. In this regard I call your attention to §3, Art. XVI, State Const.:

Section 3. *Salaries of officers payable upon requisition.*

The salary of every officer shall be payable *monthly* upon his own requisition. (Emphasis added)

The terminology of the phrase "every officer" as used in §3 is sufficiently broad so as to include a clerk of the civil and criminal court of record. Therefore, in the absence from §1 of Ch. 59-869 of a specified mode of payment, it would appear that the above stated constitutional provision is controlling in the instant situation.

Since the increase, payable in monthly installments, became effective on May 28, 1959, such increase only affects the salary for the months of May through December, 1959. Sections 1 and 6 do not authorize payment of retroactive salary. (§11, Art. XVI, State Constitution.) (See State ex rel. Bayless v. Lee, 156 Fla. 494, 23 So. 2d 575.)

In regard to A. G. O. 058-57, the opinion expressed there does not control the instant situation. The question there dealt with an act that increased the maximum annual salary to be retained by a *county fee officer*.

I call your attention to A. G. O. 058-98, wherein I discussed the effect of opinion 058-57:

In Opinion 058-57, dated February 18, 1958, I held, when the maximum compensation of a fee officer is changed by a law that provides a certain amount as the maximum amount that may be retained by such officer from the *income of his office as compensation, and the law does not specify a date upon which the change is effective, it becomes effective on January 1, of the year in which it was enacted.* . . . (Emphasis added.)

In light of the foregoing, it is my opinion that since §6 of Ch. 59-869 specifically contains an immediate effective date as to the operation of §1, distinguishing it from the situation discussed in A. G. O. 058-57, the salary increase provided for under §1 is payable in monthly installments to the clerk as of May 28, 1959.

Question 1 is therefore answered accordingly.

AS TO QUESTION 2:

This question has been answered by question 1. It should be pointed out that under §1 of Ch. 59-869 the clerk remains primarily a fee officer for the remainder of the year 1959, receiving merely an increase in his monthly salary payable in accordance to the mode and manner utilized before passage of this act, i.e., if the clerk were retaining a monthly allowance from the net income of his of-

face, he would continue to do so until Jan. 1, 1960, when the mode of payment would change; the clerk will retain each month such amount proportionate to the increase in salary from May 28, 1959, until Jan. 1, 1960.

I hope that the above information has been of some assistance to you.

059-167—August 21, 1959

### SCHOOL CODE

SUPPORT OF PUBLIC SCHOOLS—TUITION FEE CHARGED PUPILS WHOSE PARENTS OR GUARDIANS ARE NON-RESIDENTS OF FLORIDA—§228.16(3) (b), (c), F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

### QUESTION:

Does the tuition fee of fifty dollars to be charged pupils whose parent, parents, or guardian are non-residents of Florida under the provisions of §228.16 (3)(c), F. S., apply to students enrolled in (a) kindergartens, (b) vocational schools and (c) adult education classes for which instruction units are provided under the Florida minimum foundation program?

Section 228.16 (3), F. S., as amended by the 1959 legislature, now provides, in part:

(a) Public education in *grades one to twelve* inclusive, comprising elementary and secondary schools and vocational departments or schools, shall be made available at public expense for a minimum term of at least nine months each year (one hundred and eighty actual teaching days) to all persons who have attained the age as provided by section 232.01. The funds for the support and maintenance of these schools shall be derived from state, county, district, federal or other lawful sources, combinations of sources, or as specifically set forth in this subsection.

(b) Pupils whose parent, parents, or guardian are nonresidents of Florida shall be charged a tuition fee of fifty dollars payable at the time the pupil is enrolled. For the purposes of this subsection a nonresident is defined as a person who has lived in Florida less than one year, or who has not purchased a home which is occupied by him as his residence prior to the enrollment of his child or children in school or who has not filed a manifestation of domicile in the county where the child is enrolled. No tuition shall be charged pupils whose parent, parents, or guardian are in the federal military service or are a civilian employee, the cost of whose education is provided in part or in whole by federal subsidy to state-supported schools, or whose parent, parents, or guardian are migratory agricultural workers.

The tuition required by this act of nonresidents applies to all "public education in *grades one to twelve, inclusive, comprising elementary and secondary schools and vocational departments or schools. . .*" (Emphasis supplied.) This act, however, must be

construed together with the provisions of §228.16, F. S., which provides:

*Support of public schools.*—The public schools shall be supported and financed as prescribed below and in chapters 236 and 237. No matriculation or tuition fees shall be charged pupils whose parents are bona fide residents of Florida, except as prescribed herein.

(1) **NURSERY SCHOOLS.**—Nursery schools, when organized as public schools or public school classes, shall be supported and maintained from county taxes, district taxes, or from such funds supplemented by tuition charges, or from funds from federal or other lawful sources, exclusive of state sources.

(2) **KINDERGARTENS.**—Kindergartens, when organized as public schools or public school classes comprising children who have attained the age as provided by §232.04, *shall be considered as part of the elementary school organization* and shall be supported and maintained by funds from state, county, district, federal or other lawful sources or combinations of sources.

(3) **ELEMENTARY AND SECONDARY SCHOOLS.**—Public education in grades one to twelve inclusive, comprising elementary and secondary schools and vocational departments or schools, shall be made available at public expense for a minimum term of at least nine months each year (one hundred eighty actual teaching days) to all persons who have attained the age as provided by §232.01. The funds for the support and maintenance of these schools shall be derived from state, county, district, federal or other lawful sources or combinations of sources.

(4) **JUNIOR COLLEGES; TECHNICAL OR VOCATIONAL SCHOOLS AND SCHOOLS OFFERING UNGRADED WORK.**—Junior colleges, and technical or vocational schools and schools offering ungraded work for persons regardless of age, when organized in accordance with the provisions of law, shall be supported and maintained as a part of the county school system from funds derived from state, county, district, federal or other lawful sources or combinations of sources; provided, that tuition or matriculation fees may be charged only if and as authorized by regulations of the state board.

(5) **OTHER SCHOOLS, COURSES, AND CLASSES.**—Other schools, courses and classes shall be supported by state, county, district, and federal funds or by any combinations of these funds supplemented by funds from such other lawful sources as may be available; provided, that tuition or matriculation fees may be charged only if and as authorized by regulations of the state board.

The act therefore does apply to kindergartens, since they are considered a part of the elementary school organization (§228.16 (2)).

It does apply to vocational schools.

It also applies to adult education classes if the instruction provided is "public education in grades one to twelve." Tuition is authorized above the secondary level by §228.16 (5) for both residents and nonresidents.

Tuition may be charged to junior college students, both state residents and nonresidents, under regulations of the state board of education as provided in §230.48 (2), F. S. and §228.16 (4), F. S.

059-168—August 28, 1959

#### TAXATION

#### OCCUPATIONAL LICENSES—MASSAGE—OPERATORS OF COIN-OPERATED SLENDERIZING ESTABLISHMENTS—

—§§480.01(1), (4) AND 480.02(3), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**May an occupational license be issued to an owner of a coin-operated body slenderizing, reducing and contouring machine, of a mechanical or electrical nature, who holds no certificate of registration as a masseur or masseuse under Ch. 480, F. S.?**

This question poses the application of Ch. 480, F. S., to the operation of the said machine; if applicable then the requirement of §480.02(3), F. S., that "no occupational license, state, county or city, shall be issued to any person unless he or she shall have in his possession a certificate of registration and current certificate of renewal, duly authorized and signed by the board of massage examiners." The machines in question are installed by their owners in locations easily accessible by the public and their services may be obtained by customers by inserting a coin in a slot in, or in connection with, such machines which causes it to operate. Its operation is designed to accomplish body slenderizing, reducing or contouring through the use of mechanical and electrical apparatus and devices.

This question brings up the question of the application of the court's opinion in *Florida Board of Massage v. Underwood*, Fla., 45 So. 2d 184, to the present statutes regulating the practice of massage in this state. In this case there was involved "mechanical equipment, electrically operated, being applied to the human body for the sole purpose of slenderizing, "such equipment consisting of a "hip chair, arm chair, hobby horse, foot table, couch composed of three adjustable panels, and a cushion," which equipment did not "massage the human body, but sets up or causes a gentle vibration of the human body;" this was held not within the purview of the definition of "massage" as then defined by §480.01, F. S., as including all or any one or more of the subjects or methods of treatments as then included in §480.01(1) (subsection (4) of §480.01). The subjects and methods of treatment, as defined in §480.01(1), consisted of "the art of body massage, either by hand or with any mechanical or electrical apparatus for the purpose of body massaging, reducing or contouring, the use of oil rubs, salt glows, hot and cold packs, tub, shower, sitz and similar baths, cabinet baths, excluding fever therapy."

In *Florida Board of Massage v. Underwood*, supra, the court remarked that in its opinion the legislature, by appending the term "electrical apparatus" as a descriptive phrase to the "art of body massage," clearly limited such electrical apparatus to that which rubs, strokes or kneads the body, according to the general definition of the term "massage." The court further remarked that "it



is true that the legislature has also included in its definition other practices, ordinarily found in a massage establishment, which do not involve rubbing, stroking or kneading of the body, such as hot and cold packs, tub, shower, sitz and cabinet baths, but this merely reinforces our opinion, since the legislature could have added 'electrical apparatus' to the group of practices not involving an actual massage of the body."

Section 480.01, F. S., was amended by Ch. 29971, 1955, subsequent to the filing of the opinion of the court in *Florida Board of Massage v. Underwood*, supra, so that the practice of massage includes "who practices, administers or teaches all or any one or more of the following subjects and methods of treatment, viz: who administers or teaches treatments with any mechanical or electrical apparatus for the purpose of body slenderizing, body reducing or body contouring." Under §480.01(4) and (a) and (b) of (1), a person is deemed to be practicing massage who "*administers . . . all or any one or more of the following subjects and methods of treatments, viz: oil rubs, salt glows, hot or cold packs, all kinds of baths including steam rooms, cabinet baths, sitz baths, colon irrigation, body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, pettrasage, rubbing, effleurage (or) tapotement.*" The italicized language was added to the statutes subsequent to the filing of the court's opinion in *Florida Board of Massage v. Underwood*, supra, clearly for the purpose of supplying the deficiency mentioned by the court in that case to meet the court's statement that "the legislature could have added 'electrical apparatus' to the group of practices not involving an actual massage of the body."

There seems little if any doubt that a person personally using a mechanical or electrical apparatus or devices, for the purpose of body slenderizing, reducing or contouring, through the application of movements such as stroking, friction, rolling, vibration, kneading, cupping, pettrasage, rubbing, effleurage or tapotement, or any one or more of such movements, would be within the purview of Ch. 480, F. S., and would be required to be licensed or qualified under Ch. 480, F. S. Does the fact that the owner of such mechanical or electrical apparatus or devices will not be in personal supervision and direction of them change or make any difference in this requirement? We do not think so; legislation, such as the regulation of the practice of massage, is primarily designed to protect the general welfare and the public interest (*Sullivan v. DeCerb*, 156 Fla. 496, 23 So. 2d 571). When a business or profession is such as to affect the public health, safety and welfare, it may be regulated under the police powers of the state (16 C. J. S. 925, et seq., §188).

It does not appear to make any difference as to how the fee is paid for such services or the use of such equipment, whether paid directly to a licensed masseur or deposited in a coin box.

Where body massage is given, through the use of any mechanical or electrical apparatus or devices, by applying stroking, friction, rolling, vibration, kneading, cupping, pettrasage, rubbing, effleurage or tapotement, such massage appears to be within the purview of Ch. 480, Florida Statutes, whether applied, through the use of such mechanical or electrical apparatus or devices, under direct supervision of the owner or his agent or by an unsupervised

machine. The potential of such mechanical or electrical apparatus or devices for injury to the public is as great, if not greater, when there is no supervision as when there is personal supervision. We, for the purpose of this opinion, presume that the provisions of Ch. 480, F. S., were enacted to protect public health, safety and welfare.

Until the constitutionality and validity of Ch. 480, F. S., is finally determined by the courts we feel that the above question must be answered in the negative, unless it be clear to the tax collector that the machine is not within the purview of Ch. 480, F. S., as construed by this opinion.

059-169—August 28, 1959

#### TAXATION

LIABILITY OF LAND OWNER FOR TAXES ASSESSED FOR PAYMENT OF BONDED INDEBTEDNESS AGAINST LAND REMOVED FROM CITY LIMITS AFTER ACCRUAL OF SAID INDEBTEDNESS—§6, ART. IX, STATE CONST.;

§§169.06, 169.10 AND 169.11, F. S.

To: *Elwood P. Safron, City Attorney, Punta Gorda*

#### QUESTION:

May the owner of real property formerly within the limits of a municipality, said municipality then having bonds outstanding against it, and subsequently such real property is removed from the limits of said municipality, be compelled to pay the millage originally assessed against said property while the property was within the municipal limits; if so, will additions and improvements to said property be subject to the bonded indebtedness; may said property or any part thereof be revalued for ad valorem tax purposes?

It appears from the letter presented us with request for opinion that at some time in the past an individual owned real property within the corporate limits of a municipality of this state at a time when said municipality issued certain improvement bonds. Subsequently, the individual's property was removed from the confines of said municipality. The municipal bonded indebtedness remains outstanding at this time.

Section 6, Art. IX, State Const., grants to municipalities the power to incur bonded indebtedness. Section 169.06, F. S., authorizes the city council to impose taxation for the payment of bonds "upon the property within the city." "All cities and towns which have issued any improvement bonds . . . may levy a tax on all property taxable by such city or town for the purpose of paying either the principal or interest due upon any such bonds . . ." (§169.10, F. S.). (Emphasis supplied.) Section 169.11, F. S., declares that municipal improvement bonds are general obligations of the city or town issuing same.

"It is definitely settled that public bonds issued by states and their subdivisions constitute contracts within the purview of constitutional provisions banning laws impairing the obligation of contracts, especially as respects the source of payment for the bonds." (43 Am. Jur. 484, §273). It appears equally well settled that the organic duties and obligations of the parties attach at the time of the issuance of public bonds and securities, subject, however, to the

rule that a subsequent exemption from taxation of property originally taxable for payment of bonds may, under some circumstances, be effective and not subject to argument that such exemption is an impairment of a contractual obligation (see *Long v. St. John*, 126 Fla. 1, 170, 317, 109 A. L. R. 809; *Folks v. Marion County*, 121 Fla. 17, 163 So. 298, 102 A. L. R. 659).

The rule in this state appears to be that "where bonds have been issued by a de facto municipal corporation acting under prima facie legislative power and thereafter some of the lands are excluded from the jurisdiction of the corporation because they are not so located that they can, will or may receive any municipal benefits from the corporation, the municipality is without power to levy or collect any tax for the purposes of raising money to pay the bonds issued while those lands were prima facie within the corporate limits, unless it shall appear that the owners of such lands have in some way estopped themselves from contesting the tax levy. On the other hand, *if the lands have been benefited by the improvement for which the bonds were issued . . . then they are subject to the levy of taxes to raise money to pay the bonds . . .*" (*Certain Lands, Etc. v. Town of Lake Placid*, 159 Fla. 180, 31 So. 2d 249, text 252; see also *Richmond v. Town of Largo*, 155 Fla. 226, 19 So. 2d 791 and cases therein cited; *City of Sarasota v. Skillin*, 130 Fla. 724, 178 So. 837). (Emphasis supplied.) The most recent pronouncement of this rule appears in the above cited case on remand from the initial decision, *Certain Lands, Etc., v. Town of Lake Placid*, Fla., 49 So. 2d 542, text 543-4, where the supreme court, in holding that the primary question was "whether or not the lands of the defendants" which had originally been within the municipal limits at the time the bonds in question were issued but which had been subsequently ousted "received any direct or indirect benefits from the expenditure of the bond proceeds . . ." stated that "this court is committed to the doctrine that notwithstanding lands have been ousted from the jurisdiction of a municipality, they are nevertheless subject to be taxed for debt service for bonds issued while said lands were apparently within the boundaries of the municipality . . ." This has been cited by the district court of appeals (2nd dist.) in *City of Ocoee v. Bell*, Fla. App., 108 So. 2d 766, text 768.

From the foregoing authorities it would appear that an individual owning land without the limits of a municipality having bonded indebtedness which had accrued when said lands were within the limits of the municipality would be taxable to the same extent as if said land had remained within the municipal limits, ". . . if the lands have been benefited by the improvement for which the bonds were issued . . ." (Emphasis supplied.) There is a presumption of benefits from the improvements. The question of whether or not such lands had been benefited by reason of the improvements made would, of course, be a question of fact to be determined from the circumstances in each individual situation. Furthermore, it would appear that if it is determined that the lands under consideration are determined to have received such benefits from the improvements, such as would retain said lands "within the city" for purposes of ad valorem taxation to pay off the bonded indebtedness, said lands should be treated the same as lands presently within the municipality which are subject to additional improvement revaluation or other changes in the property for purposes of tax assessment.

The foregoing discussion appears to answer your questions as well as same can be answered based on the cited authorities of this state.

059-170—August 28, 1959

**CORPORATIONS AND BUSINESS TRUSTS  
ADDITIONAL TAX REQUIRED WHEN CHANGING CAPITAL  
STOCK STRUCTURE—§608.05(4), F. S.**

To: R. A. Gray, *Secretary of State, Tallahassee*

**QUESTION:**

Should a Florida corporation, on filing an amendment changing its capital structure from 10,000 shares of par value stock to 10,000 shares of no par value stock, be charged the filing tax fee on the no par value stock; or is the amount paid on the original 10,000 shares of par value stock sufficient payment to cover the amendment changing the capital structure to 10,000 shares of no par value stock?

Section 608.05 (4), F. S., sets forth two distinct stock classifications subject to a filing tax. According to §608.05(4) (a)-(d), the par value stock filing tax is based upon the dollars-and-cents value of such stock. On the other hand, paragraphs (e) through (h) of said subsection provide that the no par value stock tax is based upon the number of shares of such stock.

The present situation indicates that the corporation under consideration, upon incorporation, authorized 10,000 shares of par value stock and were taxed in accordance with paragraphs (a) through (d). The said company has proposed an amendment changing its original capital stock structure from par value stock to no par value stock. (The authorized amount of shares has not been changed.) Applying the filing tax schedules to the instant situation, it would appear that if the Redolent Products Co., upon incorporation, authorized 10,000 shares of no par value stock, the filing tax would be figured upon a *share basis*, which tax would be much higher than the tax on par value stock. Thus, if a corporation originally authorizing par value stock were permitted to change its classification to no par value stock without paying the filing taxes geared to that particular stock, then the operation of such tax schedules as set forth in §608.05(4) would thereby be circumvented. This would result in a situation whereby a corporation could accomplish indirectly what it could not have accomplished directly.

Chapter 608 was enacted for the purpose of regulating and controlling corporations. In accordance with this general scheme, the legislature in enacting §608.05 set up a schedule of filing fees and taxes. The legislature, recognizing the distinction between par value and no par value stock, decided to tax them on an entirely different basis. Certainly no other section, subsection, or paragraph of Ch. 608 was intended to circumvent the operation of the separate filing taxes on these two different kinds of stock.

An examination of the *entire* statute reveals the legislative intent in regard to these filing taxes.

The practical inquiry in litigation is usually to determine what a particular provision, clause, or word means. To answer it one must proceed as he would with any other



composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed . . . ." (Sutherland's Statutory Construction, 3rd Ed., Vol. II, pp. 336-337, §4703)

In discussing the literal interpretation of words contained within a statute, Sutherland points out:

. . . For although many expressions of approval for the rule may be found in the cases *it is perfectly clear that if the literal import of the words is not consistent with the legislative intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature. . . .*" (Emphasis supplied.) (Sutherland's Statutory Construction, supra, p. 333-334, §4701.)

In construing any other subsection or portion of §608.05, we must not lose sight of the fact that the legislature intended that a different filing tax apply to par value and no par value stock. The legislature in so doing did not intend that a filing tax for one particular kind of stock satisfy the filing tax for another kind; nor did it intend that if par value stock were originally issued and later changed, by amendment, to no par value stock, there would be no filing tax consequence. Any other interpretation would thwart the operation of §608.05 as well as the entire statute.

. . . A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction . . . (Sutherland's Statutory Construction, supra, page 338, §4704).

In this regard it is wise to observe the remarks of Chancellor Kent:

. . . In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion (One, Kent's Comm., 38th Ed. (1884), page 462, cited in Sutherland's Statutory Construction, supra, pp. 338-339, §4704).

In light of the above statements, it is my opinion that if a corporation changes its capital structure from par value stock to no par value stock, the corporation should be charged the filing tax relating to the no par value stock less any amount paid at the time of the original authorization of the par value stock. Your question is therefore answered accordingly.

059-171—August 28, 1959

# ELECTORS AND ELECTIONS

## USE OF VOTING MACHINES BY MUNICIPALITY WHEN OWNED BY THE COUNTY—§§ 101.32 AND 101.36, F. S.

To: Harry Booth, Mayor, City of Crestview

### QUESTION:

May a municipality, located within a county owning and using voting machines in general and special elections held therein, with the consent of the county, use voting machines in its elections without first submitting the question of their use to the electors pursuant to §101.32, F. S.?

Section 101.32, F. S., provides in part:

The board of county commissioners or the governing body of a municipality may if they so elect, submit to the electors of a county or municipality at a general or special election the question of whether it shall adopt voting machines; provided that no special election shall be called for the sole purpose of determining this question. If a majority of the electors approve of same, the board of county commissioners of the county or governing body of the municipality shall adopt for use at elections any kind of voting machine that meets the requirements set forth in §101.28, and the machines shall be used at any and all elections held in the county or municipality or any part thereof for voting, registering and counting votes cast at any election; provided that the board of county commissioners or governing body may purchase, install and use, not to exceed five voting machines, for experimenting with same in districts or precincts without submission of the question to the electors of the county or municipality . . . .

However, the following language was added by Ch. 59-116, to wit: "The provisions of this section relating to the submission of a question to the public relating to the adoption of voting machines shall be construed as permissive." (Emphasis supplied.) This addition would be meaningless if it were construed to have the same meaning already provided in the language first quoted. We think the new language had the effect of authorizing the governing body of the county or municipality to exercise its discretion as to whether a referendum should be held at all. In other words it authorized elimination of the condition precedent in the existing statute which provided that unless a favorable referendum vote was cast no more than five voting machines could be used or purchased. It thus removed the mandatory requirement of an approving referendum vote and left it to the judgment of the county or municipal officials to determine whether voting machines would be purchased or used in whatever number deemed appropriate.

Section 101.36, F. S., after providing that when a county has voting machines they shall be used in all general, primary and special elections, further provides that "in all counties above one hundred fifty thousand population according to the latest federal census, which have adopted the use of voting machines, it shall be mandatory for all municipalities in such counties to use voting machines in all elections, but in all counties of lesser

population it shall be optional with each municipality as to whether it shall use ballots or voting machines in its elections."

When §§101.32 and 101.36, F. S., are read together and with other sections of the election laws, in the light of *State v. Crume*, 131 Fla. 848, 180 So. 38, with special attention to the addition made to §101.32 by Ch. 59-116, we feel that the above question should be answered in the affirmative. We make special reference to the provision in §60, Ch. 57-1245, if adopted at the referendum mentioned in §73 of said chapter, that "voting machines may be used in any election in which they are available," which provision may well have had in mind the provisions of §101.36, authorizing municipal use of voting machines owned by the county wherein located.

059-172—September 1, 1959

#### TAXATION

#### OCCUPATIONAL LICENSES AND LICENSE TAXES—PRIVATE HUNTING PRESERVES—§§205.49 AND 205.53, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are persons operating private hunting preserves, who make a charge for allowing a person to hunt thereon, required to obtain an occupational license and pay a license tax under Ch. 205, F. S.?

In this state "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter (Ch. 205, F. S.) or other law of this state unless" the required license tax be paid and a license obtained. The operation of a hunting preserve for the purposes aforesaid would not seem to be classified either as a profession or an occupation; therefore, may it be classified as a business? The terms *business*, *occupation* or *trade*, as used in statutes imposing a license tax "ordinarily mean a business, occupation or trade in a commercial sense carried on with a view of profit or livelihood." (53 C. J. S. 556, §27). Business has been said to be a "word of large significance, and denotes the employment or occupation in which a person is engaged to procure a license" (*Harper v. England*, 124 Fla. 296, 168 So. 403, text 406); when used in a statute imposing a license tax it means "a business in the trade or commercial sense, one carried on with a view to profit or livelihood" (*Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, text 472). In this connection see also 5 Words and Phrases, 979-980, and 998-1005, and supplement.

We are, therefore, of the opinion that a private hunting preserve, open to the public or a portion of the public for a fee, would be subject to an occupational license tax under Ch. 205, F. S., where operated as a commercial enterprise with the view of profit or livelihood. Should the tax collector ascertain that the hunting preserve is being operated by its owner as a commercial venture with a view to profit or livelihood, so as to be subject to taxation, then the question arises as to the section of the statute under which it should be licensed.

If not otherwise subject to classification under some other provision of the statute it would come under §205.49, F. S., relating to unclassified businesses. Section 205.53, F. S., levies a

license tax upon businesses "that perform some service for the public in return for a consideration." Here the service to the public may be said to be the permission granted to hunt on the private hunting preserve and take game therefrom. This would seem to justify a classification under said §205.53. The license here mentioned is one levied against the business of the owner of the hunting preserve who operates the same for a profit or livelihood or as an income producing business. The fact that the owner may be licensed under said Ch. 205, F. S., will not relieve the person hunting from obtaining a proper license from the fish and game commission.

059-173—September 1, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
MORTGAGE BROKERAGE ACT, CH. 59-309 (CH. 494, F. S.)—  
EXTENSIONS AND MODIFICATION OF PAYMENT**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Where a mortgage broker, acting for the mortgagor, obtains from the mortgagee an extension of maturity and a modification of payments to be made, are his services within Ch. 59-309?**

A mortgage broker, as used in Ch. 59-309, the mortgage brokerage act, is defined as a person "who for compensation, or in expectation of compensation, either directly or indirectly makes, negotiates or offers to make or negotiate a mortgage loan." A mortgage loan, as used in said act, is also defined as "any loan secured by a mortgage on real estate located in the State of Florida," excluding certain loans made or guaranteed by the federal government. The above stated question appears to present the problem of whether an extension and modification of payments under a mortgage is a "mortgage loan" within the purview of said Ch. 59-309.

Generally the granting of an extension for the payment of a mortgage debt (*Miami Real Estate Co. v. Baxter*, 98 Fla. 900, 124 So. 452; 59 C. J. S. 342 §280), or the satisfaction of an existing mortgage and the taking of a new one to secure the payment of the same indebtedness (*Federal Land Bank v. Godwin*, 107 Fla. 537, 145 So. 883; 59 C. J. S. 342, § 281), are not deemed to constitute new mortgages but a mere continuation or renewal of the existing one, so that priority is not given thereby to intervening mortgages or liens. A mortgage is a security for a debt or obligation, and where there is no debt or obligation there is no mortgage (27 Words and Phrases, 623-625). "An essential feature of a mortgage is the existence of an indebtedness, payment of which it is designed to secure." (*Smith v. Hope*, 47 Fla. 295, 35 So. 865, text 866). There is a distinction between a renewal of an obligation and an extension thereof (*Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909). In the usual extension there is no new note or new promise of the maker to pay the original obligation, merely an indulgence on the part of the payee or obligee for a time after the due date of the original obligation. The extension of maturity and modification of payments mentioned in the above question is not a "mortgage loan" within itself, but at most an indulgence



by the mortgagee as to the unpaid balance. The indebtedness continues to be secured by the same mortgage, which at most has been merely extended, unless the extension and modification agreement goes beyond a mere modification and extension and includes additional obligations not a part of the original mortgage and indebtedness agreement.

The above stated question is answered in the negative, subject, however, to an examination of the extension and modification agreement to determine its status as such an extension and modification agreement or otherwise.

059-174—August 31, 1959

### CRIMES

#### VIOLATION OF STATE LOTTERY LAW—ZINGO GAME

To: *L. B. Vocelle, Representative, Indian River County, Vero Beach*

#### QUESTIONS:

1. Does a radio promotion entitled "Zingo" set forth in the following statement of fact constitute a violation of the lottery laws of this state?

2. Would this production be legal if the element of skill were added?

#### STATEMENT OF FACTS:

Radio listeners are invited to participate in the game of "Zingo" by securing a "Zingo" card at designated places of business. There is no charge for the card and it is good for one week's participation in the game. The game is played by numbers being called on radio programs. A person establishing a straight line of five numbers becomes a winner and receives a cash prize.

It is well settled that there are three elements to a lottery:

(1) a prize (2) an award by chance and (3) a consideration.

The promotion described obviously contains a prize for the winner.

It would also seem apparent that the award is by chance inasmuch as "Zingo" appears to be nothing other than the game of bingo played as it is normally played except that the numbers are called on a radio program.

The existence of consideration is equally apparent when this situation is considered in light of the decision in the case of *Little River Theatre Corp. v. State*, 135 Fla. 854, 185 So. 855. Here, the consideration stems from the fact that the participants must obtain a "Zingo" card from designated merchants each week in order to play the game. The inducement to the public to present themselves at the named establishments with the resulting benefit to that establishment and inconvenience to the participant is deemed to be obvious.

Therefore, I am of the opinion that question 1 should be answered in the affirmative.

Since you did not elaborate on the manner in which the element of skill might be added to this scheme, I hesitate to give an unequivocal answer to question 2, inasmuch as many attempts to add this element have amounted to nothing more than mere subterfuge. However, I am of the opinion that question 2 should

be answered in the affirmative if the award of the prize is based upon the contestant correctly performing some act requiring the utilization of skills within the capacity of the general public even though the opportunity to win by exercising such skills is granted only to winners of "Zingo." Should the acts required be so difficult as to be within the capacity only of experts, or so easy as to constitute a sham, then rather than skill being the controlling factor in winning the prize, the element of chance would predominate and the question would be answered in the negative.

There are, of course, almost innumerable ways in which this element of skill might be added to a scheme such as this. The most common way seems to be the testing of a person's knowledge through questioning. For a discussion of the element of skill as exercised in the answering of questions concerning the geography of West Florida, see my earlier opinion 058-128, dated April 14, 1958.

059-175—September 3, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
PLUMBING PERMIT REQUIRED FOR INSTALLATION IN  
RESIDENCE BY OWNER—CHS. 21445, 1941 AND 553,  
F. S.; §§553.03(4), 553.07 AND 553.11(2), (4), F. S.**

To: *Johnnie A. McLeod, Justice of the Peace, Apopka*

**QUESTION:**

**Is a person who installs his own plumbing in his own residence required to obtain a plumbing permit as required by §553.07, F. S.?**

In addition to the provisions of Ch. 21445, 1941, authorizing the city of Orlando to make plumbing inspections within one mile of the city limits and to charge a fee therefor, §553.07, F. S., authorizes the county commissioners of counties in certain population brackets to *issue permits for plumbing installations* and charge a reasonable fee therefor to defray the cost of inspection of the installations.

By way of comparison it is noted that §553.11(2), F. S., provides that *none* of the provisions of Ch. 553 shall be applicable to minor maintenance or repairs as defined in §553.03(4). On the other hand, §553.11(4) states that the provisions of Ch. 553 *shall not prohibit* a bona fide owner from personally installing plumbing in his own residence. Section 553.11(4) was apparently not intended to be as broad an exemption as is §553.11(2) and does not appear to take the individual making his own *major* repairs or installations from the purview of the plumbing control act.

In comparing the two sections, 553.11(2) and 553.11(4), it becomes evident from the language used that it was the legislative intent to *remove* all *minor installations* and repairs from the regulations imposed by the plumbing control act, whereas it was not the intent of the legislature to relieve the individual making his own major plumbing repairs or installations from complying with the provisions of the act requiring installation permits for such work and inspection of the same.

While Ch. 553, F. S., does not require a bona fide owner to be a licensed plumber in order to personally install plumbing in his own home it does appear to require him to comply with the re-

quirements of the law and secure a permit similarly as in cases where licensed plumbers handle installation work and makes his work subject to inspection to insure proper installation in order to protect not only the health, welfare and safety of the individual involved but the health, welfare and safety of the entire community. The act does not prohibit the home owner from installing plumbing in his own home but it does require that he secure the usual installation permit required of others and subjects his work to inspection.

Accordingly, your question is answered in the affirmative.

059-176—September 3, 1959

**PUBLIC LANDS AND PROPERTY**  
**ADOPTION OF CHANGE OF BULKHEAD LINE BY MUNICIPALITY SINCE EFFECTIVE DATE OF §253.122, F. S.—**  
 §§253.12-253.129, F. S.

To: *Van H. Ferguson, Director, Trustees Internal Improvement Fund, Tallahassee*

**QUESTION:**

**May a municipality, under charter provisions in force and effect when §253.122, F. S., was enacted, adopt or change a bulkhead line without complying with said section?**

Under §253.122(1), F. S., boards of county commissioners or governing bodies of municipalities, subject to the formal approval of the trustees of the internal improvement fund, may, after giving the notice required by said section and holding the public hearings required, locate and fix "a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable waters of the county." "Where any bulkhead line has been located and fixed by any municipality pursuant to statutory authority, such bulkhead line shall be accepted and adopted by the county commissioners of the county wherein such municipality is located as its bulkhead line within the territorial area of such municipality subject to the provisions" of §§253.12-253.129, F. S. A reading of §§253.12-253.129, convinces us that after the effective date of said sections the authority of municipalities to fix bulkhead lines or to amend existing bulkhead lines is subject to the requirements of said sections, whether or not their charter provisions remain effective.

This office has construed §253.122, as adopting existing municipally fixed bulkhead lines, when fixed pursuant to existing statutory authority, and making them bulkhead lines recognized by said section (A. G. O. 058-210, of June 30, 1958). If this bulkhead line is to be amended the provisions of §253.122 must be complied with notwithstanding a compliance with the requirements of the municipal charter. Special attention is directed to the provision in §253.122(4), which provides that "upon the establishment of any bulkhead line or lines as herein contemplated, any proposal thereafter made to change said line or lines shall be published" as therein required with copies of said notice being served as required by said statutory provision. Where a municipal bulkhead line, legally established, was in existence on the effective date of §253.122 (June 11, 1957), the same may be legally changed only by complying with

said §253.122, F. S., unless the municipality has been relieved from compliance with said section by an act of the legislature adopted subsequent to June 11, 1957.

The above question should be answered in the negative, unless the municipality has been relieved from complying with §253.122, by legislation adopted subsequent to June 11, 1957. This being true, the validity of Ormond Beach ordinance 58-12, of March 18, 1958, is doubtful, and should not be recognized, unless and until its validity is further verified. Ordinance 54-18, of Aug. 3, 1954, is presumed to be within the purview of §253.122, adopting municipal bulkhead lines established prior to June 11, 1957. We are unable to clearly say, after reading the municipal charter, that the municipality was without authority to fix a bulkhead line, there being language in the charter when taken and considered as a whole which might be construed as granting such authority.

059-177—September 4, 1959

#### EXTRADITION PROCEEDINGS

SHERIFFS—CHARGES AGAINST ANOTHER STATE FOR SERVICES RENDERED IN PROCEEDING TO REMOVE PERSON FROM FLORIDA—§30.51, F. S.—CH. 59-365

To: *Hugh Lewis, Sheriff, Suwannee County, Live Oak*

#### QUESTION:

May the sheriff of a county which is on the budget system charge the authorities of another state for services performed in arresting and keeping a person in connection with extradition proceedings instituted to procure the removal of said person from Florida to that state?

Section 3195, Title 18, U. S. C. A., dealing with extradition contains the following provision:

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

Section 30.51, F. S., relating to sheriffs who operate under budgets, is the controlling Florida statute on this subject, and subsection (1) of said section provides in part:

... All fees, commissions and other remuneration provided by law for services other than criminal shall be charged by the said sheriff to other authorities and parties doing business with their offices, and shall be paid over to the county as provided in this section. (Emphasis supplied.)

Services performed by a sheriff in connection with extradition proceedings are "services other than criminal." The Florida Supreme Court has held that proceedings in extradition are "*sui generis*." (*State v. Quigg*, 91 Fla. 197, 107 So. 409). This means that an extradition proceeding is neither criminal nor civil; rather it is in a class by itself. Since services performed by a sheriff in connection with extradition are services other than criminal, said subsection (1) requires a sheriff who is on a budget to charge such services to other authorities doing business with his office, viz., the authorities of the demanding state.

I find nothing in Ch. 59-365 which alters the situation. That chapter added subsection (6) to § 30.51, as follows:



(6) No sheriff shall render to *another county* a bill for service of process in any *criminal matter*. (Emphasis supplied.)

When said subsection (6) speaks of "another county," it means another county in Florida and has no reference to a county of another state. Moreover, as indicated above, an extradition proceeding is not a "criminal matter." Consequently, said subsection (6) has no bearing on your question.

In view of the provisions of said U. S. statute and of said subsection (1) of §30.51, F. S., my conclusion is that your question should be answered in the affirmative.

059-178—September 8, 1959

**BOARD OF COMMISSIONERS OF STATE INSTITUTIONS  
RINGLING MUSEUMS—LIABILITY OF TRUSTEES OF RING-  
LING MUSEUM OF ART—USE OF RINGLING TRUST FUND—  
CH. 59-60 (§272.19, F. S.).**

*To: George F. Higgins, Chairman, Board of Trustees of the  
Ringling Museums, Sarasota*

**QUESTIONS:**

1. Are members of the board of trustees of the Ringling museums individually liable as to matters arising from the operation of said museums?

2. May Ringling trust fund moneys be used to purchase and restore items such as wagons, the calliope, etc., for the circus museum?

**AS TO QUESTION 1:**

The board of trustees of the Ringling museums is a state agency which acts under the authority of the board of commissioners of state institutions and of the state (Ch. 59-60). As such, the board is entitled to the privilege of governmental immunity. The immunity of state agencies has been expressly recognized by the Florida supreme court (*Weir v. Palm Beach County* and the *State Road Dept.*, 85 So. 2d 865).

The doctrine of sovereign immunity would be of little consequence if state officers, employees and trustees were subject to suit for actions taken within their statutory authority (*Florida Juris. Adm. Law*, §236). It has been held that when an administrative officer acts within the scope of his authority or jurisdiction, he is not responsible unless he acts from a corrupt motive, even though he misconstrues the law and acts erroneously.

Although this doctrine is applicable both to the board members in their individual capacity and to the board as a corporate entity, Ch. 59-60 takes into consideration the protection of patrons of the museums by authorizing the board to procure public liability insurance.

In view of the foregoing, your specific question is answered in the negative.

**AS TO QUESTION 2:**

I assume that the trust fund referred to in this question is the trust fund established by the Ringling will. Paragraph "second" of the will restricts the use of the trust fund income as follows:

(d) the income and/or principal which may be paid to the State of Florida pursuant to paragraph "Fourth" hereof shall be used for the purpose of adding to, embellishing or increasing the contents of said Museum;

The museum referred to in the will was the existing "John and Mable Ringling Museum of Art" and the residence of John Ringling. The circus museum to which you refer was established later by the state. Therefore, strictly interpreting the will, the income from the trust fund may not be used for the purpose requested, and the answer to your specific question must be in the negative.

059-179—September 9, 1959

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—COMPENSATION—PERQUISITES—  
SOCIAL SECURITY, ETC.—CHS. 122 AND 123, §§122.02,  
122.30(4), 282.01(15), F. S., (§15, CH. 59-500,  
GENERAL APPROPRIATIONS ACT)**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTIONS:**

1. In determining the salary and average final compensation of members of the state and county officers and employees retirement system, is the reasonable value of living quarters, food and lodging furnished them considered as a part of their salary?

2. Is the value of such living quarters, food and lodging within the purview of the federal social security statutes, when applied to state and county officers and employees brought in under §418, title 42, of the U. S. code, in the light of Ch. 122, F. S.?

3. If social security taxes upon the reasonable value of living quarters, food and lodging and other things furnished such state and county officers and employees, in addition to their cash wages, are required to be paid, from what funds should such taxes be paid?

For the purposes of the state and county officers and employees retirement system of this state (Ch. 122, F. S.), "state and county officers and employees" are defined in §122.02, F. S., as including "all fulltime officers or employees who receive compensation for services rendered from state or county funds, or from funds of drainage district or mosquito control districts of a county or counties, or from funds of the state board of administration, . . . provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries . . ." (subsection (1)). "Salary" is defined as the "fixed monthly compensation paid officers and employees, and, where officers' or employees' compensation is derived from fees set by statute, salary shall be the total cash remuneration received from such fees." (subsection (3)). "Average final compensation" is measured by the "average salary" of the member over a period of time (subsection (2)). We find nothing in said Ch. 122 indicating an intention on the part of the legislature to consider living quarters, food and lodging furnished officers and employees as part of their compensation. Neither do we find in former Chs. 121 and

134, F. S., nor in present Ch. 123, F. S., any legislative intention to consider living quarters, food and lodging furnished officers and employees thereunder as a part of their salaries.

However, §15, Ch. 59-500, (general appropriations act), provides that "it is the *intent* of the legislature that the salary, or combined salaries, or other compensation for services *including perquisites*, as defined by the State Budget Commission for any position included in a legislative budget, shall not exceed the amount included in the legislative budget for such position unless specifically authorized by the legislature; provided, however, the State Budget Commission may approve an increase over the amount included in the legislative budget for such position when it determines the request for the same justifiable and in the best interests of the state . . . ." This quoted language shows an intention of the legislature, at least for the current biennium, to change the rule and include perquisites as a part of compensation within the regulations of said §15, Ch. 59-500.

In the light of said § 15, Ch. 59-500, changing the general rule as expressed in our opinion 059-15 of Jan. 26, 1959, we believe that questions 1 and 2 should now be answered in the affirmative where the requirements of said §15, Ch. 59-500 have been complied with.

In the light of the changes made in existing laws (as expressed in our said opinion 059-15, of Jan. 26, 1959) by §15, Ch. 59-500, and the ruling of the federal social security administration, evidently based in whole or in part upon said §15, Ch. 59-500, that the value of perquisites as aforesaid is and should be calculated as a part of the compensation of the officer or employee for purposes of social security impositions, it is now deemed necessary that we determine from what fund, matching fund obligations of the state must be paid. Section 7, Ch. 59-285, amended §122.30(4), F. S., so as to read as follows:

(4) There is hereby annually appropriated, for county officers and employees, out of the intangible tax fund of the state and for state officers and employees out of the intangible tax fund, or any other source provided by law, and there shall be paid into the described funds such appropriated amounts, as follows:

(a) Into the state and county officers and employees retirement fund an amount equal to the total amount paid into said fund by the members of this division; and

(b) Into the retirement social security fund the amount required by the federal social security act, related statutes and rules and regulations thereunder, to be paid by the state with respect to the social security coverage of members of this division, as herein provided.

It was the evident intent of the legislature, by this amendment, to make provision for paying the state's obligations, to match the contributions of officers and employees under the social security laws and statutes, from the intangible tax fund, in the manner provided by said §122.30(4), F. S., as amended. These observations answer question 3.

In the light of the above and foregoing statutes, laws and authorities, including said §15, Ch. 59-500, we now answer the above stated questions as follows:

1. Due to the changes made in Florida law since our opinion

059-15, of January 26, 1959, question 1 is now answered in the affirmative during the current biennium.

2. In the light of the changes made by said §15, Ch. 59-500, and the recent ruling by the federal social security administration, the second question is answered in the affirmative during the current biennium.

3. Social security impositions being, for the current biennium, based in part on perquisites received by state and county officers and employees, such impositions, as to the state and county obligation, are to be paid as are provided by §122.30(4), as amended by §7, Ch. 59-285, that is, from funds derived from intangible personal property taxes.

059-180—September 9, 1959

### ELECTORS AND ELECTIONS

#### APPLICATION OF §97.061, F. S., IN CONNECTION WITH ISSUANCE OF SPECIAL REGISTRATION CERTIFICATES TO ILLITERATE PERSONS—§§97.061, 101.051, 101.061, 101.48 AND 101.52, F. S. AND CH. 59-446

To: R. A. Gray, Secretary of State, Tallahassee

#### QUESTION:

What is the effect of a specific provision included in one section of an act which is in apparent conflict with a general provision included in another section of the same act? (In its specific application, what is the effect of the last two sentences of §101.061, F. S. on §97.061, F. S.?)

In 1959 the legislature amended §§97.061, 101.051, 101.061, 101.48 and 101.52, F. S., comprising part of the election code to provide for the issuance of special registration certificates to illiterate and physically impaired electors and to set up voting procedures to be followed by election officials when such certificate is not available (see Ch. 59-446). Prior to the passage of this chapter there was no provision for the issuance of such special registration certificates.

The sections specifically relating to the above inquiry are §§97.061 and 101.061. Section 97.061, as amended, substantially provides for the instances in which special registration certificates will be issued and to whom such certificates will be issued. A reading of such section by itself appears to connote that it is the intent of the legislature that electors who are either illiterate or physically impaired are entitled to receive special registration certificates upon their request at the time of their registration. This certificate appears to serve a three-fold purpose:

1. Presentation of this certificate at the polls will enable the holder thereof to receive such assistance in voting as set forth in §§101.061 (marking ballots) and 101.52 (using voting machines).

2. The certificate is also an alternative for the examination procedure set forth in §§101.051 (examination relating to ballot voting) and 101.48 (examination relating to machine voting). The latter sections provide an oral examination at the polls in the event a special registration certificate was not issued or renewed pursuant to §97.061.

3. The certificate will be of a continuing nature and renewable at each election.



Section 101.061 provides assistance to an elector in marking ballots, which elector has either been issued a special registration certificate under the provisions of §97.061 or has submitted to an examination under the provisions of §101.051. At the end of §101.061 the following two sentences appear:

*... The special registration certificates under this act shall not apply or be issued to illiterates. Provided however that no special registration certificate shall be issued to any person on account of illiteracy. (Emphasis supplied.)*

It appears that the above sentences were meant to apply to those certificates issued pursuant to §97.061 and as such appear to have been improperly included in §101.061 relating to assistance in marking ballots. It further appears that these two sentences are in conflict with the general provisions of §97.061 authorizing the issuance of special registration certificates to illiterate and physically impaired electors.

*97.061 Special registration certificate; electors requiring assistance.—*

(1) Any person who is otherwise eligible to register but who is found by the supervisor to be so illiterate or so physically impaired as to make it impossible indefinitely for him to register or to cast his vote efficiently shall upon his request be registered by the supervisor under the procedure prescribed by this section and shall be entitled to receive assistance at the polls under the conditions prescribed by the applicable provisions of this code.

\* \* \*

(3) Such persons upon being registered shall be issued a special registration certificate . . . without the necessity of being examined orally and under the authority at the polling place by the election inspection board. . . .

The language of the two sentences in question is specific in its prohibition against the issuance of special registration certificates to illiterate electors. There can be no question as to its meaning where the intention of the legislature is so apparent from the language used.

There is no safer nor better settled canon of interpretation that when language is clear and unambiguous it must be held to mean what it completely expressed. (Sutherland's Statutory Construction, 3rd Ed., Vol. 2, p. 334, §4702, and *Ross v. Gore*, Fla., 48 So. 2d 412).

The question therefore narrows itself down to what effect will this specific provision in §101.061 be given in view of its apparent conflict with the general provisions of §97.061.

If Ch. 59-446 were read as a whole, omitting the two sentences in question, it would appear to be the legislative intent that illiterates as well as physically impaired electors would be entitled to special registration certificates; reading said chapter as passed with the two sentences included conveys the impression that the legislature intended that such certificates were to be issued to physically impaired electors *only* and *not* to illiterates as well.

In regard to giving effect to an entire statute, it is stated in 82 C. J. S. §346, pp. 705-712:

Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardi-

nal rule of construction of statutes that force, meaning, significance, or effect must be given, if possible, and if it can fairly and reasonably be done, to the whole statute *and every part, section, and provision thereof*, and to all the language employed or contained therein, . . . including every word, term, phrase, expression, clause, sentence and paragraph, so that no part will become inoperative and so as to render the statute a harmonious, consistent, and symmetrical whole . . . (Emphasis supplied).

The legislative intent therefore is gleaned from the entire statute as a whole including its parts. In furtherance of the above, it would appear that construing the two sections in question together with the entire act, to permit harmony, it was the intention of the legislature to limit the issuance of special registration certificates to physically impaired electors only. It should be noted that if the two sentences in question were made a part of §97.061 instead of part of §101.061, the operation of the prohibition or limitation would be more apparent. The effect or intention of this provision in question should not be made any the less operative merely because the legislature placed it in one section instead of another, where the clear import of the words used in such provision indicates its intended application.

In regard to the interpretation of conflicting provisions, it has been held that the last expression of the legislative will is the law, and, in case of conflicting provisions in the same statute or different statutes, the last in point of time or order of arrangement prevails (*Johnson v. State*, 157 Fla. 685, 27 So. 2d 276). It appears from an examination of the legislative journals that the two sentences in question were added to the act pursuant to house and senate amendments *after* its original introduction. Applying the above rules of construction to the instant situation, it appears that the two sentences are not only last in point of time but also last in point of order of arrangement. Therefore, this last expression of the legislature in §101.061 would appear to control any provision in §97.061 relating thereto.

Perhaps a more substantial factor in pointing out the superseas operation of the two sentences in §101.061 in regard to §97.061 is the distinction between general and specific provisions in an act.

. . . where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision . . . (50 Am. Jur. Statutes, p. 371, §367; 82 C. J. S. Statutes, pp. 720, et seq., §3476).

Section 101.061 is specific in its prohibition against the issuance of special registration certificates to illiterates. Section 97.061 authorizes generally the procedure under which illiterates and physically impaired electors can register and receive assistance, "under the conditions prescribed by the applicable provisions of the code" (§97.061(3)), and this is subsequently qualified by the specific provisions of §101.061.

It should be pointed out that the mere fact that illiterates will not receive special registration certificates does not in any way

affect the right of such illiterates to register or subsequently receive assistance when voting. If the illiterate is otherwise qualified, he is entitled to register and subsequently vote. Under the application of Ch. 59-446, an illiterate elector could be registered by the supervisor of registration pursuant to §97.061(1); and if he submitted to the examination set forth in §101.051 or §101.48, he would be entitled to the assistance in voting as set forth under the provisions of either §101.061 or §101.52.

In view of the preceding observations, which you can readily see involve rather complex statutes, I am of the opinion that the specific provision contained in §101.061 will control the issuance of special registration certificates under §97.061; and insofar as any conflict may exist, the specific provision would modify the general provisions, the latter of which embraces matters included in the specific provision. Therefore it would appear that illiterate electors would not be entitled to receive a special registration certificate issued under §97.061.

059-181—September 10, 1959

#### CRIMINAL PROCEDURE

CUSTODIAN OF WARRANTS AFTER RETURN—PREPARATION OF DOCKETS, TIME OF DELIVERY OF COMMITMENT TO SHERIFF—§§937.01, 937.18, 922.01 AND 925.02, F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee

#### QUESTIONS:

1. Who is custodian of warrants after the sheriff's return has been made?
2. Who is responsible for preparing the dockets for trials and appearances?
3. Who should endorse on warrants the judgments and sentences?
4. After judgment and sentence, when should a commitment be delivered to the sheriff?

#### AS TO QUESTION 1:

After the sheriff makes a return on a warrant issued by a county judge, it should be delivered to and kept by the issuing judge as its custodian.

#### AS TO QUESTION 2:

It appears that the only provision for any sort of docket for the county judge's court is that §937.01, F. S., requires a county judge to keep a docket such as §937.18, F. S., requires a justice of the peace to keep. Section 937.18 reads as follows:

Every justice of the peace shall enter in his docket the title of all criminal cases brought before him, the time when the first process was issued, the service and return thereof, all adjournments, the time and manner of the trial, or other disposition of the case, the judgment or sentence, including the costs allowed, the names of all witnesses and jurors sworn on the trial, the time of issuing warrants of commitment, the payment of all fines and costs which shall be paid into the hands of the justice, with the date thereof, and all other proceedings had by and before the justice of the peace relative to

each case, and he shall sign his name thereto after rendering judgment.

The docket thus required to be kept is neither a trial docket nor an appearance docket and, since I find no other statute on the subject, I do not think that the law requires the preparation of either a trial docket or an appearance docket for the county judge's court.

However, as a matter of practicality, the county judge ordinarily sets cases for trial on future dates and keeps some kind of list or memorandum of the settings for his own convenience and that of defendants, their attorneys, and other interested persons. The sheriff, of course, has no responsibility for preparing such a list or memorandum.

AS TO QUESTION 3:

I assume that this question refers to arrest warrants and I find no requirement of law that the judgment and sentence be endorsed on such a warrant by anyone.

AS TO QUESTION 4:

Section 922.01, F. S., which, by virtue of §925.02, F. S., has governed the procedure in all criminal cases commenced or instituted since Oct. 10, 1939, prescribes the time for the issuance of a commitment in a criminal case. Said statute reads as follows:

Upon pronouncement of a sentence imposing a penalty other than a fine only or death the court shall, unless the execution of the sentence is suspended or stayed, and, in such case, upon revocation of the suspension or termination of the stay, *forthwith* commit the defendant to the custody of the sheriff together with a certified copy of the sentence, and the sheriff shall thereupon, within a reasonable time, if he is not the proper official to execute the sentence, transfer the defendant, together with the copy of the sentence, to the custody of the official whose duty it is to execute the sentence, and shall take from such official a receipt for the defendant and make a return thereof to the court. (Emphasis supplied.)

In *Dettmer v. Mayo*, 61 So. 2d 192, the supreme court of Florida said:

The words "*forthwith*" and "*thereupon*" when used with reference to time "are generally construed to mean without delay or lapse of time." (Emphasis supplied.)

Therefore, it appears that a commitment should be issued without delay when the county judge pronounces a sentence imposing a penalty other than a fine only unless the execution of the sentence is lawfully suspended or stayed, in which case the commitment should be issued without delay upon the revocation of the suspension or termination of the stay.

059-182—September 11, 1959

#### COMMERCIAL RELATIONS

CONSTRUCTION OF CH. 678, F. S. — WAREHOUSEMEN AND WAREHOUSE RECEIPTS— §§678.04, 678.55, 678.551, F. S.

To: Nathan Mayo, Commissioner of Agriculture, Tallahassee

QUESTION:

May a warehouseman receive a commodity at a point some distance from his warehouse, and at such point



issue a non-negotiable warehouse receipt, prior to the said commodity being actually received and stored in his warehouse?

Recently the U. S. department of agriculture, commodity stabilization service, adopted certain regulations relative to the stabilization of peanut prices, under which the following conditions apply:

1. The type and grade of the peanuts shall be determined at the outlying point and the MQ-94 will be issued at the point.

2. Peanuts shall be weighed on approved scales at the outlying point.

3. The warehouse receipt shall be issued for each lot of peanuts received at the outlying point to show the warehouse in which the peanuts are to be stored.

4. The association or CCC shall not be responsible for any loss or damage to the peanuts before they are deposited in the warehouse irrespective of the cause of such loss or damage, and the peanuts shall be insured for their full market value from the time they are accepted from the producer until they are stored in the approved warehouse.

5. The peanuts shall be moved promptly from the outlying point and deposited in the warehouse. The peanuts shall be kept separate by type and segregation throughout the entire receiving and transportation operation so that they may be stored promptly in the warehouse.

The warehouseman's records shall include a railroad bill of lading or a corresponding document in case of truck shipment so as to identify the vehicle in which each shipment is made, and in the case of truck shipment the driver's name, the truck license number, the date and time the truck left the designated outlying point and the date and time the truck arrived at the warehouse. Peanuts shipped by truck shall be covered with a tarpaulin which shall be securely fastened on all sides.

In substance the question for consideration is whether or not a compliance with the above enumerated conditions would be violative of Ch. 678, F. S., regulating the issuance and use of warehouse receipts in this state. It is our understanding that the warehouse receipts to be issued and used under this plan would be nonnegotiable receipts within the purview of §678.04, F. S. Primarily the question is whether or not there would be a violation of the requirements of §§678.55 and 678.551, or either of them. Section 678.55, prior to its amendment by Ch. 28237, 1953, required that warehoused goods be actually in the warehouse, or under the actual control of the warehouseman, at the time of the issuance of the warehouse receipt. The amendment requires that such goods be both in the warehouse and under the control of the warehouseman; however, said Ch. 28237 added a new and additional section to the statutes, now known and designated as §678.551, F. S., wherein a field warehouse arrangement is authorized. Under this section a field warehouseman must have the warehoused goods in his actual possession in order to issue a custodian's certificate or receipt. Section 678.55, as amended, and

§678.551, were intended to replace original §678.55. When these two sections are read in the light of prior §678.55, it is made evident that the arrangement above required by the commodity stabilization service, of the U. S. department of agriculture, constitutes a field warehouse within the purview of §678.551, F. S. The custodian's receipt or receipts are in legal effect warehouse receipts. The warehoused commodity moves from the field warehouse mentioned in §678.551, to the main warehouse where it is permanently stored. Whether delivered to the warehouseman under §678.55 or under §678.551, the provisions of Ch. 678, F. S. are applicable to the warehoused commodity.

The above stated question is answered in the affirmative.

059-183—September 11, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
EMINENT DOMAIN—PROCURING RIGHT-OF-WAY FOR PUBLIC  
WAY TO NAVIGABLE STREAM OR LAKE—§127.01  
AND CH. 418, F. S.**

To: *John W. Booth, County Attorney, Board of County Commissioners, Palatka*

**QUESTION:**

**May a board of county commissioners procure by eminent domain a right-of-way for a public way connecting a navigable lake or stream to the highway system of the county for the purpose of permitting the public use of the lake by the public?**

We are advised by the request for opinion that the navigable lake or stream in question is located in township 9 south, range 23 east, in Putnam county. An examination of the township map and the field notes of the government survey of the said township reveals that a chain of lakes therein, which appear to aggregate some 3,000 or more acres thereof, was meandered by the government surveyor and treated by him as a navigable waters. The fact that these lakes were meandered by the government surveyor raises a presumption that they are navigable waters and that the water bottoms of such lakes are sovereignty lands belonging to the state. Being navigable waters they and the water bottoms thereof are held by the state in trust for the use of the public.

Although such waters are to be classified as public waters, which the public may use for purposes of boating, bathing and fishing, the public may not trespass upon private lands in reaching such waters. We have some information that the lands abutting on such waters are in private ownership so that, except for air transportation, one may not reach such navigable waters without passing over privately owned lands.

We presume that the county desires to obtain public road rights-of-way over such private lands for the purpose of furnishing public access ways to the said lakes from the public road system of the state and county. We also presume that the public way contemplated would be a county public road from the existing county highway system to the waters of the lake.

One of the first purposes that suggests itself to us is access to the lake for purposes of hunting and fishing therein and thereon. It is generally held by the courts that hunting and fishing is a private rather than a public use (*Osceola County v. Triple E.*

Devel. Co., Fla., 90 So. 2d 600; Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483, 172 A. L. R. 168; Albright v. Sussex County Lake and Park Com., 71 N. J. L. 303, 57 A. 398, 69 L. R. A. 768, 108 A. S. R. 749, 2 Ann. Cas. 48; Cox v. Revelle, 125 Md. 579, 92 A. 203, L. R. A. 1915E 443; New England Trout and Salmon Club v. Mather, 68 Vt. 338, 35 A. 323, 33 L. R. A. 569; Hartman v. Tresie, 36 Colo. 146, 84 P. 685, 4 L. R. A. (NS) 872; Hampton v. State Game and Fish Com., 218 Ark. 724, 238 S. W. 2d 950; State Game and Fish Com. v. Hornaday, 219 Ark. 184, 242 S. W. 2d 342; and Otawah Hunting Assn. v. Kansas, 178 Kan. 460, 289 P. 2d 754). It was remarked in the Otawah Hunting Assn. case that "hunting may be personal to the individual who does it, but the right to go hunting is public."

Although the Peavy-Wilson Lumber Co. case sought to take lands by eminent domain for a public park for use as "playgrounds, recreational centers and other recreational purposes," in the language of the court, "when the whole testimony is appraised the bare fact is that the property is sought for a public hunting and fishing ground." The county's evidence of its need of the property "for playgrounds, recreational centers and other recreational purposes failed," leaving as a basis for the taking of the property to be a roadway to the lake for hunting and fishing purposes by the public.

Condemnation in the Triple E. Devel. Co. case failed primarily because the two lakes there involved, to which a county road was planned, were determined to be privately owned and not navigable, as was alleged in the petition for eminent domain. Said lakes were not even meandered by the government surveyor. Although the taking of a right-of-way was denied in this case primarily because the lakes were not navigable and public waters, the court did remark that "hunting and fishing are not county purposes and do not bear any relation to public health, morals or safety," and that "the leisure and inclination to hunt and fish constitutes a private rather than a public use."

The concurring opinion of Mr. Justice Drew, in the Triple E. Devel. Co. case, which was concurred in by another member of the court but not by a majority of the court, is interesting in that it states "had the road been condemned for the purpose of reaching a county park, playground or other public area adjacent to the shores of said lake or had lands been included in the condemnation along the shores of the lake for some lawful county recreational or public purpose, then I think the County Commissioners would have been acting clearly within the scope of their power and such action would have been lawfully taken."

In the Peavy-Wilson Lumber Co. case the court, referring to Ch. 10100, 1925, now appearing as Ch. 418, F. S., remarked that said statute, "granted counties authority to acquire lands for playgrounds and recreational purposes. . . . The effect of this statute was to declare that the construction and maintenance of parks and playgrounds was a county purpose for which public funds could be expended." The court, at the time of rendering its opinion in this case, deemed it unnecessary that it then determine whether the lands might be taken by eminent domain for such purposes.

An examination of §127.01, F. S., reveals a legislative intention to grant counties power of eminent domain to procure lands needed

"for any county purpose." Section 127.01(2) expressly provides that "no county shall have the right to condemn any lands, *outside of its own county boundaries*, for parks, playgrounds, recreational centers or other recreational purposes." This language might be taken as recognizing the right of the county to acquire property for such purposes within such county. Subsequent portions of said subsection would bear a like construction.

This leads to the conclusion that eminent domain proceedings would not lie where the purpose of the proposed road is to reach the waters of the lakes for purposes of hunting and fishing; however, if it is the design of the board of county commissioners to establish a playground and recreation center or park, or other public purpose within the purview of Ch. 418, F. S., it is possible that eminent domain proceedings *might* lie for the establishment of such a park or playground and road thereto.

A warning note should be sounded that in the Peavy-Wilson Lumber Co. case the county bringing the proceeding failed to sustain the need for such a park or playground, and was only able to prove a use for fishing and hunting.

The above observations answer your inquiry as well as the same may be answered other than by a court proceeding seeking to obtain the right-of-way and other needed lands by eminent domain.

059-184—September 14, 1959

#### CONSERVATION REGULATIONS

MOTORBOAT REGISTRATION—CH. 59-399 (CH. 371, F. S.);  
§371.051, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Do the county tax collectors, the Florida state board of conservation, and the Florida game and fresh water fish commission, severally, have equal right, power and authority to issue certificates of registration for pleasure boats, as defined in Ch. 59-399?**

Chapter 59-399, which is the new motorboat registration act, provides in the new §371.051, F. S., as follows:

(1) The owner of each motorboat requiring numbering by this state shall file an application for number with the *tax collector of the county, the board of conservation or the Florida game and fresh water fish commission*. The application shall be signed by the owner of the motorboat and shall be accompanied by a fee required by this law or Chs. 370 or 372, F. S., whichever is applicable, based upon the use of the motorboat.

(2) Certificates of registration for pleasure boats shall be issued in the county by the *tax collector of each county or his agent*. Each tax collector shall be assigned a block of numbers and certificates therefor which upon issue, in conformity with this act and with any rules and regulations of the board, shall be valid as if issued directly by the board. The *county tax collector or agent* duly authorized to issue certificates of registration, the *conservation department and the game and fresh water fish commission* shall be allowed a fee of twenty-five cents for each certifi-



cate issued. All registration monies, except the twenty-five cents fee allowed, except as provided in chapter 372, shall be remitted monthly to the board not later than ten days after the first of each month. The board shall transmit all monies received to the state treasurer for deposit. (Emphasis supplied.)

(3) The board and the game and fresh water fish commission shall issue certificates of registration and number to commercial motorboat owners required to register under chapters 370 and 372, at no extra cost to such owner other than a twenty-five cents service fee required when such owner submits to either the state board of conservation or the game and fresh water fish commission a license fee required under either section 370.06(1), (2), or sections 372.63 and 372.64. The board shall assign a block of numbers and certificates therefor to the game and fresh water fish commission for the purposes of this section.

Subsection (1) of the above quoted section simply states that applications for numbers shall be filed with either the county tax collector, the board of conservation, or the game and fresh water fish commission. The provisions of this subsection seem to apply equally to commercial and pleasure boats. The first sentence of subsection (2) provides that certificates for registration of pleasure boats "shall be issued in the county by the tax collector" and subsection (3) provides that the board of conservation and the game and fresh water fish commission shall issue certificates to commercial motor boat owners. This division of authority shows a very clear legislative intent that pleasure boat registration be issued by the local county tax collector or his agent in the county, and commercial boats be registered by the state board of conservation or the game and fresh water fish commission. The further statement under subsection (2) to the effect that the "county tax collector or his agent, the department of conservation or the game and fresh water fish commission shall be entitled to a fee of twenty-five cents per certificate issued" again refers to both commercial and pleasure boat registration.

Thus we see that the county tax collector or his agent in the county has exclusive authority to issue certificates of registration for pleasure boats, and your question is respectfully answered in the negative.

059-185—September 14, 1959

#### PUBLIC HEALTH

RESPONSIBILITY, AUTHORITY, AND JURISDICTION OF  
STATE BOARD OF HEALTH IN REGULATING SALE OF  
MILK FROM 5-COW HERDS AND GOAT DAIRIES AND  
TO STATE INSTITUTIONS—§1, ART. XV, STATE  
CONST.; §§502.19, 502.35, 502.02, 502.25, 381.071,  
381.031(1)(g)3.; CHS. 381 AND 502, F. S.

To: *Wilson T. Sowder, Florida State Board of Health, Jacksonville*

#### QUESTIONS:

1. What is the responsibility, authority and jurisdiction of the state board of health in promulgating and enforcing rules and regulations governing milk, cream

and milk products of producers who sell milk secured from small herds of five cows or less?

2. What is the responsibility, authority and jurisdiction of the state board of health in promulgating and enforcing rules and regulations governing milk produced and sold commercially from goat dairies?

3. What is the responsibility, authority and jurisdiction of the state board of health in promulgating and enforcing rules and regulations governing milk produced, processed, served or consumed at state, county, municipal or private institutions, including colleges, public and private schools, private organizations and public institutions such as prisons and institutions for the mentally ill and tuberculosis patients?

Section 1, Art. XV, State Const., required the legislature to "establish a State Board of Health," which has supervision of all matters relating to public health, with such duties, powers and responsibilities as may be prescribed by law. Chapter 381, F. S., established such a board of health and defines its powers and the limits thereof. Among the powers and duties of the said board may be mentioned its duties to supervise generally the enforcement of laws, rules and regulations relating to sanitation, control of communicable diseases among humans and from animals to humans, quarantine and the general health of the state.

Chapter 502, F. S., relating to milk, cream and milk products provides in §502.19 that "The provisions of this chapter shall be enforced under the supervision of the commissioner of agriculture, . . . It may also be enforced by health officers of the various municipalities and counties of the state . . ." (Emphasis supplied.)

In 1955, the legislature enacted Ch. 29615, which added §502.35 to Ch. 502, F. S.

Said §502.35 provides, among other things, as follows:

(1) The duty of administration and enforcement of all regulatory legislation now enacted applying to the production, processing and distribution of milk, cream and milk products, shall be performed by the state department of agriculture, except necessary laboratory work which the state board of health is equipped to handle and except as otherwise provided in this chapter.

(2) The administration and enforcement of all regulatory legislation now enacted, applying to the sanitation and sanitary practices of establishments where food and drink including milk, cream and milk products are sold for consumption on the premises where sold, or to the sanitary and healthful condition of such food and drink sold or offered for sale by such establishment, also, such laboratory work of testing and analyzing milk, cream and milk products, may be performed by the state board of health and local health departments of various municipalities and counties. Provided nothing contained herein shall limit the authority conferred on the commissioner of agriculture by chapter 502.

(3) There shall be the fullest cooperation and exchange of information between the state department of agriculture and the state board of health in the making of any surveys, investigations and inquiries to be made

for the purpose of determining whether or in what manner the production, processing and distribution of milk, cream and milk products may affect the public health. *Whenever the findings in the report of any survey, investigation or inquiry made by the state board of health, or the commissioner of agriculture, show any hazard to public health existing, incident to the production, processing or distribution of milk, cream and milk products, the commissioner of agriculture shall take such action as may be necessary and within the scope of the resources of the state department of agriculture, to remove such hazard. Provided nothing herein contained shall limit the authority of the state board of health to take immediate action when it appears necessary in the interest of public health.* (Emphasis supplied.)

Section 502.35, F. S., supra, establishes the public policy with respect to enforcement of laws and regulations relating to the production, processing, distribution, sale and consumption of milk and it divides the enforcement principally between two agencies, the department of agriculture and the state board of health. The purpose of the statute is to eliminate duplications and expense, yet to fully secure to the people of Florida the assurance that the milk and milk products sold or offered for sale to the public are produced under sanitary conditions and are wholesome and fit for human consumption.

Generally speaking, the department of agriculture is given jurisdiction over the production, processing and distribution of milk, cream and milk products. This takes in all dairies with the exception of the farmer having five cows or less, all processing and bottling plants and distribution establishments from the door to door delivery type to the large tank wagons. On the other hand, the state board of health has jurisdiction over laboratory work, testing and analyzing samples of milk, cream and milk products which may be referred to the board by the department of agriculture or secured directly by the board. It also has jurisdiction over the sanitation and sanitary practices employed in the production, sale and distribution of milk and milk products only to the extent necessary to protect, maintain and preserve public health and welfare in this state.

The hotel and restaurant commission, under the provisions of Ch. 509, F. S., assists the state board of health in seeing that food and milk offered to the public for consumption on the premises is wholesome and sanitary.

#### AS TO QUESTION 1:

Section 502, F. S., provides as follows:

No person by himself or by his agents, or servants, shall sell, offer for sale, expose for sale, or have in his possession with intent to sell, any product defined by this chapter that does not conform to the standard of the definitions of milk and milk products contained in this chapter; *provided that nothing in this chapter shall apply to producers of milk in Florida who produce and dispose of the milk from five cows or less by sale, or otherwise, in such county or adjoining county where such milk is produced.* (Emphasis supplied.)

In the case of *Noble v. Carlton* (1930, Fla.), 36 Fed. 2d 967,

the court, speaking on whether or not the exception of the small dairy having five cows or less, in Ch. 502, was an unreasonable classification and, therefore, unconstitutional, said:

A reasonable ground for this exemption will be found in the fact that the owner of five cows or less would not produce sufficient milk to engage in the production and sale thereof as a business, but might produce more than sufficient to meet his own requirements, and in selling his surplus to his neighbors in the same county could safely do so without the necessity of complying with regulations provided for persons producing in large quantities for sale at points remote from their domicile. This classification or exemption is not unreasonable and is therefore not in violation of the Fourteenth Amendment.

Section 381.071, F. S., derived from Ch. 29834, 1955, provides as follows:

The provisions of the rules and regulations adopted and promulgated by the board under the provisions of this chapter shall, as to matters of public health, supersede all regulations enacted by other state departments, boards or commissions, or ordinances and regulations enacted by municipalities; *provided, no provision of this chapter shall be construed as altering or superseding any of the provisions set forth in chapters 502 and 503, or any rule or regulation adopted under the authority of said chapters.* (Emphasis supplied.)

In construing the two statutes, we find there is a prohibition against the state board of health adopting a rule pursuant to §381.071, supra, that would affect the exemption contained in §502.02, relating to milk produced from five cows or less. However, in this connection specific emphasis is placed on §502.25, supra, which provides in the last sentence quoted above, as follows:

*Provided nothing herein contained shall limit the authority of the state board of health to take immediate action when it appears necessary in the interest of public health.* (Emphasis supplied.)

See also 25 Am. Jr. 287, which provides, among other things, as follows:

The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health.

Therefore, it is my opinion that neither the department of agriculture nor the state board of health has jurisdiction over the production and sale of milk by producers who have only five cows or less, provided this milk is sold or disposed of in the county where produced or in an adjoining county. The purpose of this provision is obvious. It simply allows a man who has a few (5 or less) good milk cows to give away or sell his excess milk to the neighbors without being required to go to the expense of constructing a sanitary dairy. *It must be borne in mind, however, that in a situation where it appears that the public health is endangered, the state board of health has authority to take immediate action in order to protect the public health whether it involves a dairy processing plant, a place where milk is sold for consumption on the*



*premises or a small operator milking five cows or less.* (See §§502.25; 381.031(1)(b) and (6)(g).)

Question 1 is answered accordingly.

AS TO QUESTION 2:

As already pointed out, the state board of health has no jurisdiction generally speaking over production, processing or distribution of milk (except in the interest of the public health) because this authority is vested in the department of agriculture. It is true that "goat milk" is not defined in our law. However, "milk" is defined as whole, fresh, clean, lacteal secretion obtained from milking one or more healthy cows. When goat milk is produced on a commercial basis and offered to the public for consumption the dairies or production centers where such milk is produced would necessarily fall under the jurisdiction of the department of agriculture and would be required to meet all of the conditions and requirements of Ch. 502, F. S. However, the same exemption as outlined in question 1 above would be applicable in the case of owners having five goats or less.

When the goat milk is offered to the public for consumption, the sanitation and healthful condition of the goat milk would come within the jurisdiction of the state board of health.

AS TO QUESTION 3:

Section 381.031(1)(g)3., F. S., provides that it shall be the duty of the state board of health to adopt, promulgate, repeal and amend rules and regulations consistent with law regulating the production, handling, processing, and sale of food products and drinks including milk dairies and milk plants; establishments serving food and drinks; *jointly with the state board of education*, regulate public and privately owned schools . . . regulate all places used for the incarceration of prisoners and inmates of state institutions for the mentally ill *and any other condition, place or establishment necessary for the control of communicable diseases or the protection and safety (light and ventilation) of the public health.*

In view of the provisions of §381.031(1)(g)3., *supra*, I believe the state board of health has the authority to promulgate and enforce the rules and regulations governing the production, handling, processing and sale of milk and milk products *at any place or establishment, public or private, when necessary for the control of communicable disease or the protection of the public health.*

Should it become necessary, for the foregoing reasons, to regulate the handling and sale of milk in the public or private schools, such regulation shall be done jointly with the state board of education, as provided by §381.031(1)(g)3., *supra*. Although said section does not provide for the joint regulation by the state board of health and the board of commissioners of state institutions or the state T. B. board, of the production, handling, processing and sale of milk and milk products in our state institutions, I would suggest that some degree of understanding be reached between the state agencies prior to the promulgation of rules affecting same by the state board of health. This suggestion should be adhered to except in cases of extreme emergency which most vitally affects the health of the inmates of our state institutions.

I believe this sufficiently answers your questions.

059-186—September 15, 1959

# TAXATION

## HANDWRITING ANALYSIS AS A PROFESSION, BUSINESS OR OCCUPATION—OCCUPATIONAL LICENSE TAXES—

§§205.01 AND 205.41; CH. 205, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

### QUESTIONS:

1. Where a technically trained person uses the science of handwriting analysis when making recommendations for professional or business purposes in connection with personnel selection and placement, credit reporting, criminology, identification of questioned documents, guidance and counseling, rehabilitation of the handicapped, and medical and psychiatric research and similar activities, is such person required to obtain a license and pay a license tax under Ch. 205, F. S.?

2. Would such a person teaching handwriting analysis be required to obtain such a license?

In this state "no person shall engage in or manage any business, profession or occupation for which an occupational license tax is required," by Ch. 205, F. S., or any other law, unless the required license tax is paid and a license obtained (§205.01, F. S.). The terms business, occupation or profession as used above mean a business, occupation or profession in a commercial sense carried on with the view of profit or livelihood (A. G. O. 059-172, of Sept. 1, 1959). If the person mentioned in question 1 is using his knowledge of the science of handwriting analysis, in connection with the purposes mentioned in question 1, with the view of profit or livelihood, in connection with a business, profession or occupation pursued by him, question 1 should be answered in the affirmative.

"'Business' is a word of large significance, and denotes the employment or occupation in which a person is engaged to procure a living." (Harper v. England, 124 Fla. 296, 168 So. 403, text 406). "An occupation as employed in excise tax laws has reference to one's vocation." (Pensacola v. Lawrence, 126 Fla. 830, 171 So. 793, text 795). A profession has been said to be a vocation, calling, occupation or employment involving labor, skill, education, special knowledge, but where the labor and skill involved is predominantly mental or intellectual, rather than physical or manual (Black's Law Dictionary).

Where a technically trained person uses the science of handwriting analysis for professional or business purposes, in a commercial sense with a view to profit or livelihood, we feel that question 1 should be answered in the affirmative; otherwise, it should be answered in the negative. In this connection see our opinion 053-298, of Nov. 4, 1953 (1953-1954 A. G. O. 282), relative to the practice of graphology and grapho analysis as being within the purview of §205.41, F. S.

With reference to question 2, reference is made to the opinion of the court in Lee v. Gaddy, 133 Fla. 749, 183 So. 4, text 6, and Lambert v. Mullan, Fla., 83 So. 2d 601, text 603 and 604, where the court strongly indicates that school teachers are not subject to license taxes as the operators of a business, profession or occupation. The operation of a school wherein handwriting analysis is

taught might, under proper circumstances, constitute the operation of a business subject to license taxes.

059-187—September 15, 1959

**SCHOOL CODE**  
**COMPULSORY SCHOOL ATTENDANCE—MARRIED**  
**STUDENTS—§232.01, F. S., AS AMENDED BY**  
**CHS. 59-412 AND 59-419**

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

**QUESTION:**

**Do Chs. 59-412 and 59-419, relating to the attendance of married students in public schools, include the power to prohibit school attendance solely on the ground of marriage?**

Chapter 59-419 provides, in part:

(1) All children, except those who become married, unmarried students who are pregnant, and students who have already had a child outside of wedlock, who have attained the age of seven years or who will have attained the age of seven years by February 1 of any school year or who are older than seven years of age but who have not attained the age of sixteen years are required to attend school regularly during the entire school term except as hereinafter provided; . . .

(2) The county boards of public instruction of the several counties shall have the authority to adopt rules and regulations governing the attendance of married students in the public schools.

Chapter 59-412, F. S., contains a provision concerning married students similar to that contained in Ch. 59-419.

In the case of *State ex rel Hollywood Jockey Club, Inc. v. Stein et al.*, 182 So. 863, the Florida supreme court said:

In a general sense, the power to "regulate" does not include the power to prohibit, even though every regulation commanding an act to be done in a certain way necessarily restricts or prohibits doing of act in any other way.

The legislature may expressly authorize designated officials to provide rules and regulations for complete operation and enforcement of a law within its express general purposes, but it may not delegate power to enact a law, to declare what law shall be, or to exercise an unrestricted discretion in applying the law.

The following general statement of law in this regard is contained in 76 C. J. S. 612:

The word "regulate" ordinarily indicates not so much the creation or establishment of a new thing as the arranging in proper order and controlling that which already exists, and it has been held to contemplate or imply the continued existence of the subject matter to be regulated.

The power to regulate includes the power to restrain, and indicates restriction in some respects, and the term "regulate" embraces the idea of fixing limitations and

restrictions, and contemplates the power of restriction or restraint. The word necessarily denotes some degree of restraint of acts usually done in connection with the thing to be regulated, and negatives the idea that all acts which ordinarily would be performed in connection therewith may be so performed without any restraint whatever. It has been said that to regulate means putting into effect such restrictions as may be necessary to protect the public from harm, and means and implies both government and restriction.

It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" does not convey the meaning of "prohibit." This is true in a general sense, and in the sense that mere regulation is not the same as absolute prohibition. On the other hand, the power to regulate implies the power to check, and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression, and it has been said that it does include the power to prohibit, except on the observance of authorized regulation. The word "regulate" denotes some degree of prohibition of acts usually done in connection with the thing to be regulated, and negatives the idea that all acts which ordinarily would be performed in connection therewith may be so performed without any prohibition whatever.

It is my opinion that the legislature in exempting married students, pregnant females or parents of illegitimate children from the compulsory school attendance law did not create an absolute bar from school attendance of students in these categories, regardless of all other considerations and did not authorize county school boards under their regulatory powers to create such an absolute bar.

I do think county school boards are authorized to adopt regulations relating to the right of students in these categories to attend public schools based on the effect of their attendance on the school program. In individual cases, if the board has reasonable grounds to believe that applicant's attendance will adversely affect the moral and ethical standards of other students or will be injurious to the applicant, the board may in its discretion bar said student from school attendance.

Subject to the above observations, your question is answered in the negative.

059-188—September 16, 1959

#### PUBLIC PROPERTY

TAXATION OF UPLAND ADJOINING SUBMERGED LANDS—  
RIPARIAN RIGHTS—§§194.47, 253.12, 253.122,  
253.15 AND 309.01, F. S.

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

#### QUESTION:

Where upland, adjoining submerged lands sold and conveyed by the trustees pursuant to §253.12, F. S., is taxed and a tax deed is issued pursuant thereto, without



**the taxation or sale of the said submerged lands, does the purchaser under the tax deed acquire riparian rights?**

Certain uplands lying and being in section 9, township 57 south, range 40 east, were sold and conveyed into individual ownership sometime prior to 1929, about which time the adjoining submerged lands in Biscayne bay, Dade county, were sold and conveyed to the upland owner by the trustees of the internal improvement fund under and pursuant to §§1061, et seq., R. G. S., 1920, which were brought into the Florida Statutes as §§253.12, et seq. This sale and conveyance of submerged lands to the upland owner must be presumed. It appears from your file, handed us with the above request for opinion, that the "ownership of the uplands and submerged lands was in common from March, 1929, through December, 1945."

It appears from your file that the upland in question, but not the submerged lands sold and conveyed by the trustees as aforesaid, was subjected to taxation for the years 1935 and 1941, and became delinquent, doubtless with tax sale certificates being issued thereon. These tax sale certificates and the liens thereof appear from the file to have been foreclosed, evidently under and pursuant to §13, Ch. 22097, 1943, now appearing, as amended, as §194.47, F. S. At this point the file does not show the description of the uplands as used in the tax foreclosure and whether or not the owner of the submerged lands, who may have also been the former owner of the uplands, was made a party defendant. We presume that the foreclosure decree was a normal one which did not purport to specifically vest in the county riparian rights on or over the submerged lands in question so as to constitute *res judicata* as to the riparian rights. We also presume that the deed from the trustees conveying the said submerged lands had been made a matter of public record prior to the assessment of the taxes for said 1935 and 1941. If this deed was a matter of record on such dates, then it constituted constructive notice, if actual notice had not been acquired, of the title to the submerged lands. The failure of the taxing officials to assess and levy taxes against the submerged lands did not affect the validity of the assessment against the upland nor did it give the county and its purchaser any title in or to the said submerged lands.

It is stated in *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, text 862, that "a riparian owner may separate his uplands from his submerged lands and convey both to different grantees or he may sell one and withhold the other." In this case, one Caples, who owned both the upland and the submerged lands, mortgaged the upland to Taliaferro, who later acquired title to the same through a foreclosure of his mortgage; however, this mortgage did not encumber the submerged lands owned by Caples. It was held that Taliaferro acquired no title to the submerged lands under the foreclosure and that he was not a riparian owner as against the owner of the submerged lands. (See also 65 C. J. S. 261, §130.)

Had the owner of the upland and the submerged lands made separation of the lands by conveying the upland and retaining the submerged lands, there would have, in all probabilities, been a separation of the uplands and the riparian rights appurtenant thereto; especially had the purchaser been advised of the ownership of both the upland and the submerged lands by the same owner. If the deed conveying the submerged lands was of record at the time of the assessment of the taxes in question, then those claim-

ing under the tax title may well have had constructive notice of the same, if not actual notice thereof. The grantee in a tax deed, including the county and those claiming under it pursuant to a tax lien foreclosure pursuant to §194.47, F. S., claims under the owner of the fee title of the lands at the time of the tax assessment (Porter v. Carroll, 84 Fla. 62, 92 So. 809; Day v. Benesh, 104 Fla. 58, 139 So. 448, text 452). It is the general rule that "land does not pass an appurtenant to land" (Rivas v. Solary, 18 Fla. 122). It is a general rule that a conveyance of lands as described as bordering on a navigable stream or body of water carries with it riparian rights unless such rights are expressly reserved or it otherwise appears that such riparian rights were not intended to pass. (Broward v. Mabry, 58 Fla. 398, 50 So. 826; Panama Ice and Fish Co. v. St. Andrews Bay Railroad Co., 71 Fla. 419, 71 So. 608; Thiesen v. Gulf, Florida and Alabama R. R. Co., 75 Fla. 28, 78 So. 491.)

When the submerged lands in question were purchased around 1929, the purchaser thereof had the statutory right to bulkhead and fill the same in accordance with §2460, R. G. S., now appearing as §309.01, F. S. (See §5, Chs. 6451 and 7304, 1913 and 1917, also §253.15, F. S.) When we view the entire picture in the light of the statutes and laws above mentioned, we are led to the view that the owner of the submerged lands, notwithstanding the tax deed in question, has the right to fill his said lands, so long as §§253.122 and 309.01, F. S., are complied with. The purchaser under the tax proceeding has his remedy in a court of equity to determine his rights under the tax title; so it is suggested that he be notified of any action of the trustees in this connection so that he may test and protect any rights claimed by him.

059-189—September 24, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
CONSTRUCTION OF MORTGAGE BROKERAGE ACT, CH.**

59-309 (CH. 494, F. S.), §§494.02, 494.03 AND  
494.08(3), (4) AND (6), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTIONS:**

1. Is an investor or dealer in mortgages, who purchases a mortgage as an investment or for resale, for his own account, required to register as a mortgage broker under the mortgage brokerage act?

2. Is a real estate broker, or other person not specifically exempted from the said act, who purchases mortgages for himself, or as agent for another, required to register under the said act?

3. After a mortgage broker has arranged the sale of an existing mortgage for a mortgagee or holder thereof, what fees or commissions may the mortgagee or holder be charged by the mortgage broker for his services in arranging such sale?

4. May a mortgage broker, within the purview of the mortgage brokerage act, require his customer to deposit funds, to secure the payment of any mortgage

brokerage fees or commissions prior to arranging the desired mortgage loan?

5. Where such a deposit is required may the mortgage broker retain any part thereof where no mortgage loan is obtained?

6. Where a mortgage broker procures an extension of the unpaid portion of a mortgage indebtedness, previously brokeraged by him, and an additional loan, both to be secured by a new or additional mortgage, what fees, if any, is such mortgage broker entitled to for such services?

*The first three questions raise the question of the extent of the operation of the mortgage brokerage act (Ch. 59-309), and whether or not its operation extends to transactions concerning the mortgage, and the indebtedness secured by it, in the hands of the mortgagee and subsequent holders and owners. The title to the said act designates it "an act relating to mortgage transactions on real property; (and) providing for the qualifications, amount of fee and licensing of mortgage brokers and mortgage solicitors . . . ." As used in said act the term "mortgage loan" means any loan secured by a mortgage on real estate located in the state of Florida," with certain exceptions not now material, and the term "mortgage broker" means every person not exempt under section 3 of this act, who for compensation or in expectation of compensation, either directly or indirectly makes, negotiates or offers to make or negotiate a mortgage loan." (§2, Ch. 59-309). Generally, a "broker" may be defined as a person who "is engaged for others, on a commission, in negotiating contracts relative to property with the custody of which he has no concern" (12 C. J. S. 5, §1; American Fire Ins. Co. v. King Lumber and Mfg. Co., 74 Fla. 130, 77 So. 168, text 174). The court, in the American Fire Ins. Co. case, quoting from Hooper v. Calif., 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297, with approval, held that the "business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about 'the meeting of their minds,' which is necessary to the consummation of the contract. . . ." In 12 C. J. S. 8, §3, a "broker is distinguished from an agent, in that a broker holds himself out for employment by others, and acts as an intermediate negotiator between the parties to a transaction, and in a sense is the agent of both parties . . . ."*

A mortgage broker would not seem to extend to a person lending his own money, to be secured by a mortgage on real property in this state, for his own account and not through a broker. An investor or dealer in existing mortgages who purchases mortgages as an investment or for resale, *for his own account*, does not appear to be within the purview of the mortgage brokerage act, and need not and should not be registered as such. Persons who, as brokers or agents for others, purchase *existing* mortgages as investments or for resale also do not appear to be within the purview of the mortgage brokerage act, and need not and should not be registered thereunder so long as such transaction is not a scheme to procure a mortgage for another within the purview of the said mortgage brokerage act. Although a mortgage broker may have arranged the sale of existing mortgages and mortgage loans for the mortgagee or holder thereof, he would not be within the

purview of such act, not then being the arranger of the mortgage itself, and would not be entitled to fees and commissions under said act; unless the transaction was in fact arranged or brokered for the mortgagor within the purview of the mortgage brokerage act.

These observations lead to negative answers to questions 1, 2 and 3, unless the same be *indirectly* for the account of the mortgagor and designed to avoid the operation of said mortgage brokerage act.

Questions 4 and 5 bear upon the authority of a mortgage broker to require a deposit to secure the payment of his fees and commissions, and primarily involve §8 of the mortgage brokerage act. The fees and commissions to be charged by mortgage brokers licensed under the act are set out in §8(d), which are declared by said subsection to be "the maximum fees and commissions which may be charged for any mortgage loans," by a mortgage broker. Reference is made to said subsection for the amount of fees and commissions to be charged. Under said §8(c), such fees and commissions set out in subsection (d) "shall include all direct and indirect costs or expenses incidental to the processing and closing of the mortgage loan transaction, including but not limited to appraisal fees, abstracting charges, title insurance premiums, and attorneys' fees," and, under said subsection (c) "no person shall charge or exact directly or indirectly from the mortgagor a fee or commission in excess of the maximum fees or commissions as set forth" in said §8(d). Said §8(f) provides that "no person shall accept a principal sum of less than twenty-five thousand dollars without delivering to the borrower a statement in writing setting forth the total maximum costs to be charged, incurred or disbursed in connection with processing and closing the mortgage loan."

From the above and foregoing it seems that question 4 should be answered in the affirmative; however, the deposit is a trust, the title to which is held in trust by the mortgage broker for the uses and purposes of securing the payment of the brokers fees and commissions and should be maintained in a trust account by the broker and not commingled with his personal funds. Such fees and commissions, which under said §8(c) are declared to include, but not to be limited to, "appraisal fees, abstracting charges, title insurance premiums and attorney's fees," would not seem to be due and payable until the mortgage loan has been arranged for and procured by the mortgage broker, and should be returned to the customer where no mortgage loan has been arranged for or procured, subject to any expenditures made therefrom, with the consent of the customer (which should be in writing for the protection of the parties); provided such expenditures may not be made for the payment of obligations of the mortgage broker under said §8(c) or otherwise. No fees or commissions, including the payment of those obligations of the broker under said §8(c) or otherwise, become due and payable unless and until a mortgage loan, in accordance with the agreement by and between the broker and his customer, is arranged for and procured by the broker for his customer. These observations seem to answer question 5 also.

Question 6, in so far as it relates to the extension of the payment of the existing mortgage obligation, was answered in the



negative by our opinion 059-173, of Sept. 1, 1959, subject to the limitations in said opinion, to which reference is made. However, we deem the additional loan mentioned in the said question 6 to be a mortgage loan within the purview of the mortgage brokerage act and governed thereby. These observations seem to answer question 6.

Briefly, questions 1, 2 and 3, not being within the purview of the mortgage brokerage act, are answered in the negative, in so far as the said act is concerned; question 4 in the affirmative, although the deposit is a trust deposit and should be considered and treated as such by the mortgage broker; question 5 is generally answered in the negative, subject to expenditures, made with the consent of the customer, which are not under the statutes to be a part of the fees and commissions; question 6 in the negative (see A. G. O. 059-173) as to the mortgage extension, but in the affirmative as to the additional loan.

059-190—September 24, 1959

### CITIES AND TOWNS

POLICEMEN'S PENSION AND RETIREMENT FUNDS—INSURANCE PREMIUM TAXES—CH. 185; §§185.01, 185.03, 185.07, 185.08, 185.16, 185.35, F. S.; CHS. 26141, 31160 AND 57-2073, ACTS OF 1949, 1955 AND 1957 RESPECTIVELY

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

#### QUESTION:

1. May the insurance premium taxes imposed pursuant to §185.08, F. S., be paid into a general municipal pension and retirement fund held for the benefit of all municipal officers and employees, including policemen?

2. If the answer to question 1 is in the negative, then may such insurance premium tax funds be paid into a general municipal officers and employees retirement fund if separate accounts are maintained so that such premium taxes will be used entirely for the payment of pensions and retirement pay to policemen only?

3. What assurances must be made to the insurance commissioner to justify payment of the insurance tax funds, derived under §185.08, F. S., to the retirement fund?

Those municipal corporations in this state which have a "lawfully established police officers' retirement fund or city fund providing pension or relief benefits to policemen, by whatever name known," may impose the insurance premium taxes mentioned in §185.08, F. S., for the uses and purposes therein mentioned. It is deemed advisable that we consider the nature and legal status of retirement compensation paid to public officers and employees; such compensation is in law withheld or delayed compensation for services rendered prior to retirement "and are not regarded as extra or increased compensation" (*State v. Lee*, 157 Fla. 62, 24 So. 2d 798, text 801). The legislature has, by §185.01, F. S., found and declared that municipal police officers act in a dual capacity and perform "both state and municipal functions; that they make arrests for violations of state traffic laws on public highways; that they keep the public peace," and for that reason "it

is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of *police officers*. . . ." This same dual state and local purpose is also recognized in §210.03, F. S., authorizing the levy and use of cigarette taxes by municipalities for the purposes therein mentioned. In other words, the duties of municipal police officers are dual in nature; they serve a state and local purpose.

Although the provisions of Art. IX, State Const. contemplate that exclusively state functions be financed through state taxation, and exclusively local functions through local taxation (*Mathews v. Amos*, 99 Fla. 1, 126 So. 308; *Palm Beach County v. State*, 99 Fla. 379, 126 So. 360) the functions of a dual nature (both state and local) may be financed by appropriate taxation (*Mathews v. Amos*, supra). Although the taxes imposed under §185.08 are imposed through municipal tax levies, the insurers are given credit therefor on like state taxes imposed. The tax imposed is by statute earmarked for a dual state and local purpose and may not be used for a purely local purpose. Funds derived from such taxes are earmarked for the use and benefit of retired municipal police officers, and not for retired municipal officers and employees generally.

Municipal officers and employees of the city of Pensacola within the purview of Chs. 26141, 31160 and 57-2073, 1949, 1955 and 1957, are not all officers and employees performing a dual state and municipal function; many of them perform only a local or municipal function; officers and employees who perform merely a municipal or local function are not within the purpose and intention of Ch. 185, F. S. Funds derived from taxes imposed pursuant to §185.08, F. S., upon insurance premiums are earmarked for the police officers of said municipality performing a dual state and municipal or local purpose, and not to those officers and employees performing only a municipal or local purpose. Such funds are earmarked for use in providing retirement compensation for police officer performing a *dual state and local purpose* but not those performing local functions only. This being true such funds may not be used, either directly or indirectly, in providing retirement compensation for other than police officers performing a dual state and local function. Question 1 must, therefore, be answered in the negative, and the funds therein mentioned may not be used for the benefit of general employees.

This brings us to question 2 which would seem to permit of an affirmative answer, provided such an arrangement would be permitted under applicable statutes and the municipal charter of Pensacola. We find nothing in above mentioned Chs. 26141, 31160 and 57-2073, 1949, 1955 and 1957, expressly authorizing such internal accounting and the maintenance of separate control accounts for the police members of the retirement system set up by said acts and for other members of such retirement system. Even if such an arrangement should be adopted it would have to conform to the requirements of the court's decree in *Philpot v. City of Pensacola*, of Jan. 8, 1959, a copy of which appears in your files.

Section 185.03, F. S., establishes in each incorporated city or town, when activated by such city or town, "a special fund to be known as the police officers' retirement fund" of such city or town, to be used *exclusively* for the making of retirement compensation payments under and pursuant to Ch. 185, F. S. This fund consists of the proceeds from the insurance premium tax authorized by

§185.08, F. S., and other items mentioned in §185.07, F. S. Except where a police officer elects to come under the federal old age and survivors insurance program, or under both a general municipal retirement plan and under the plan provided by Ch. 185, F. S., the policeman is required to contribute 5% of his salary as such policeman; however, if he elects to come under the federal program, or under an existing municipal retirement plan, *as well as under Ch. 185, F. S.*, he will receive a reduced retirement compensation under Ch. 185 (see §185.16(2), F. S.).

However, notwithstanding what has been said above, §185.35, F. S., permits a municipality to set up its own retirement plan for policemen, which "plan must be for the purpose of providing retirement and disability income for policemen." When "a municipality has a policemen's retirement plan" which meets the standards set forth in said §185.35, the income from the "premium tax in section 185.08" may be placed "in its existing pension fund for the sole and exclusive use of their policemen . . . or may use said income to pay extra benefits to the policemen." (Emphasis supplied.) The extra benefits mentioned appear to be those mentioned in §§185.07(2), and 185.16(2), F. S.; that is benefits in addition to social security or under existing general municipal pension plan. Although the policeman may elect to come under federal social security, or under his municipality's regular retirement plan, the statutes require that the proceeds from the insurance premium taxes imposed under §185.08 must *at all times be segregated from the general funds* of the municipal retirement system so that only the policemen will receive the benefits to be derived from such tax funds. This leads to the conclusion that tax funds derived under §185.08, F. S., must at all times be segregated from other funds. Even if funds derived from insurance premium taxes might be deposited in the fund maintained for general retirement, such premium taxes must be segregated by an adequate control account so that they will be used for the benefit of policemen only. This is true even though the municipality maintains its own pension plan under and pursuant to §185.35, F. S. We see no requirement in the statutes that would prevent moneys derived from §185.08, F. S., being kept in a general bank deposit provided proper control accounts be kept and maintained so that there will be a separation of the funds derived from said section from all other funds in such deposit and so that such funds will at all times be available for the purposes intended by Ch. 185, F. S. In other words, an account within an account, as is sometimes kept in the general and other funds in the state treasury. In such an account the balance in the said general deposit could never be reduced below the unused funds derived from §185.08, F. S., without a violation of Ch. 185, F. S. The views here expressed appear to be in line with the decree in *Philpot v. Pensacola*, supra. These observations answer question 2 in the affirmative; provided the accounting adopted is such as will maintain a segregation of the funds derived from the taxes imposed under §185.08 and the contributions made by the policemen, from other funds at all times, and prevent their use for other than the benefit of the said policemen.

As a condition to the paying over of tax funds derived from taxes imposed pursuant to §185.08, F. S., the insurance commissioner must require that satisfactory assurance be given that such

funds, as well as contributions made by the policemen to the fund, be kept segregated at all times in the manner aforesaid and are being used strictly in accordance with the requirements of Ch. 185, F. S. A detailed comparison of any ordinance designed to establish the municipality's own pension and retirement plan for policemen, should be made with §185.35, and it be determined whether or not there is compliance with said §185.35. It is the duty of the municipality, when it elects to come under said §185.35, to comply therewith, and until such an ordinance has been adopted the question of compliance with said section is moot. These observations answer question 3 as well as it may here be answered.

059-191—September 25, 1959

#### PUBLIC PROPERTY

APPLICATION OF §253.122, F. S., TO SUBMERGED LANDS OWNED BY ONE OTHER THAN THE ABUTTING UPLAND OWNER—§§253.12-253.15, 309.01, F. S.

To: *Van H. Ferguson, Trustee Internal Improvement Fund, Tallahassee*

#### QUESTIONS:

1. May the owner of submerged lands, purchased by the abutting upland owner pursuant to §253.12, F. S., or prior statutes or laws, but which submerged lands have been separated from the abutting ownership by sale and conveyance, fill in such submerged lands with or without compliance with §253.122, F. S.?

2. May the owner of submerged lands, purchased by a nonabutting upland owner, but with the written consent of the abutting upland owner, pursuant to §253.12, F. S., or prior statutes or laws, fill in such lands with or without compliance with §253.122?

3. Is the board of county commissioners, the governing body of a municipality, or the trustees of the internal improvement fund, fixing and locating a bulkhead line pursuant to §253.122, F. S., required to preserve a full record of their proceedings in that connection?

For the purposes of this opinion we presume that prior to the purchase of the submerged lands, described in the above stated questions, the abutting upland owner was seized and possessed of full riparian or littoral rights incident to such ownership. We here deal with two classes of submerged lands: (1) those previously vested in the abutting upland owner, placing title to the abutting lands and the submerged lands in a common ownership, and (2) those not previously vested in the abutting upland owner, but who may have consented to a conveyance to a nonabutting upland purchaser. In the first case the separation of the common ownership, of the abutting uplands and the submerged lands, was accomplished by conveyance or with the consent of the abutting upland owner; in the second case, the separation was brought on by or with the consent of the abutting upland owner. This opinion does not extend to submerged lands separated from the shore by a channel or channels of not less than five feet deep at high tide as described in §253.12, F. S., prior to the amendment by Ch. 26776, 1951, and prior stat-



utes and laws. We deal here with those lands abutting upon upland.

"The owner of land bounded on navigable waters has certain rights therein other than those belonging to the public, which are appropriately termed 'riparian' as respects nontidal waters or the waters of a river, and 'littoral' as respects sea waters or the waters of a lake. . . . The riparian (or littoral) rights of the owners of lands fronting on navigable waters are derived from the common law as modified by statute, and are the result of that full dominion which every one has over his own land, by which he is authorized to keep all others from coming on it except on his own terms. Riparian rights do not constitute an independent estate, and do not depend on ownership of the soil to the center of the stream or under water. . . ." (65 C. J. S. 143-144, §61). "The nature and extent of riparian rights are to be determined according to the local law, subject to the right of Congress to regulate public navigation and commerce." (65 C. J. S. 147, §62). "In general, riparian rights are possessed only by those owning land up to the high-water mark, although ownership of the fee is not necessary" (65 C. J. S. 148, §63). Generally, "riparian or littoral rights may be conveyed or transferred" (65 C. J. S. 258, §125). Although there are some contrary cases, the general rule is that "riparian rights, which are dependent primarily on the ownership of the soil, may be separated from the upland and may be separately conveyed" (65 C. J. S. 261, §130). "It is generally held that riparian rights may be separated from the ownership of the land to which they are appurtenant, either by a grant of such rights to another, or by a reservation thereof in the conveyance of the land," although there appear to be some exceptions not here material (56 Am. Jur. 740, §288; 9 Ann. Cas. 1236; 40 L. R. A. 393-394; 3 L. R. A. (NS) 822-823). It was stated, in *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, text 862, to be the "settled law in this country that a riparian owner may separate his uplands from his submerged lands and convey both to different grantees or he may sell one and withhold the other." (*Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, text 862). "It is a general principle that water rights which are appurtenant to land pass under a deed of conveyance of such land, unless expressly reserved," (56 Am. Jur. 710, §254) or unless it otherwise appears that it was not the intention of the grantor to transfer such rights. "Upland and lands under navigable waters may be separately owned by different persons." (65 C. J. S. 261, §129; see also *Sikes v. Moline Consumers' Co.*, 293 Ill. 112, 127 N. E. 342, text 345).

The case of *Caples v. Taliaferro*, supra, *Caples* being the owner of certain uplands abutting upon navigable waters, within the purview and meaning of §§1061-1064, R. G. S., 1920 (now appearing as §§253.12-253.15, F. S.), purchased, from the trustees of the internal improvement fund, the submerged lands upon which said upland abuts, thereby vesting title in him as to both the abutting upland and submerged lands. After such purchase *Caples*, being indebted to *Taliaferro*, mortgaged the said abutting upland to said *Taliaferro*, which mortgage, having become delinquent, was foreclosed, *Taliaferro* having purchased the said abutting upland at the foreclosure sale, and to whom said lands were conveyed by the master in chancery. *Taliaferro* filed a proceeding in chancery seeking a decree declaring that he held riparian rights ap-

purtenant to the said abutting uplands as well as the submerged lands themselves. This contention the supreme court rejected, remarking that a conclusive "reason for holding that there was no intent on the part of Caples to make Taliaferro a riparian owner is that for many years, the law of Florida had authorized the Trustees of the Internal Improvement Fund to sell certain submerged lands, that many thousands of dollars had been realized from the sale of such lands, that the submerged lands in question had been classified and sold as being within the power of the Trustees to sell and that they had actually been sold by appellants long before this suit was brought and long before Taliaferro took this mortgage. In the light of these facts, there was no reason whatever for an express reservation of the submerged lands in question in Taliaferro's mortgage. . . ." (Text 862; emphasis supplied.)

The state's trust in lands under navigable waters is rooted in common law and stems from the state's duty to its citizens assumed upon admission into the Union (*State v. Tampa*, 88 Fla. 196, 102 So. 336; *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 2d 249; *Perky Properties v. Felton*, 113 Fla. 432, 151 So. 892) so that the state's title thereto may not be disposed of by the state to the detriment of its citizens (*Deering v. Martin*, 95 Fla. 224, 116 So. 54; *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861; *Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388). Where sale of submerged lands would interfere with the rights of the public, sale thereof should not be made, even in the absence of a formal objection filed (*Deering v. Martin*, supra). Where a sale of such submerged lands would not be detrimental to the rights of the public sale thereof it may be made under §§253.12, et seq., F. S., or like or similar statutes. An examination of §§253.12, et seq., F. S., reveals a plan to protect the rights of the public when making sales thereunder. Under said section, the trustees of the internal improvement fund, prior to the sale and conveyance of submerged lands, within the purview of said §253.12, are required to publish a public notice of their intention to sell and convey, calling upon all persons who may or might be adversely affected by such sale and conveyance to make objections before the said trustees and if it be made to appear that such a sale would "interfere with the rights granted riparian owners by the laws of Florida or would be a serious impediment to navigation or public fisheries," or would otherwise adversely affect the rights of the public, "the trustees shall withdraw the said land from sale." It is presumed that the trustees, in making sales of submerged lands under this statute, complied with the duties imposed upon them by this law, and correctly ascertained facts warranting the conveyance of the submerged lands conveyed by them under these statutes (*Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249). Any attempt by the trustees to unlawfully transfer such submerged lands may be enjoined by the person or persons adversely affected (*Deering v. Martin*, 95 Fla. 224, 116 So. 54; §253.14, F. S.).

"The presumption is that the Trustees, being public officials of the state, complied with their duty under the law, and that they correctly ascertained the facts warranting their action. This presumption is to all intents and purposes a conclusive one when attempted to be put in issue by a collateral attack in a suit between private parties . . ." (*Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249, text 258). The sale and transfer of sub-

merged lands by the trustees, when the provisions of §§253.12 et seq., F. S., as to the required public notice have been complied with, raises a strong presumption as to the regularity and validity of such transfer and conveyance. After such sale and conveyance, in the absence of formal objection being made to the trustees, or coming to their attention, its regularity is presumed. The same rule would seem to apply to objections sought, within the limitations provided in §253.14, F. S., and provided further the requirements of §§253.12, et seq., F. S., were followed and complied with so as to give the trustees jurisdiction to make the sale.

It seems definite that where an abutting upland owner consents in writing, or in any other legal manner, to a conveyance of abutting submerged lands by the trustees to a third person that such abutting upland owner would be estopped to claim riparian rights over such submerged lands, in the absence of a sufficient retention in writing of such rights. Likewise an estoppel of an abutting upland owner who, owning the abutting submerged lands also, sells and conveys such submerged lands without expressly retaining such riparian rights. The question of riparian rights between such parties seems to involve private and not public rights; the question of public rights is presumed to have been disposed of in the sale proceeding at the time of the sale of the submerged lands by the trustees.

This brings us to the question of the status of subsequent owners claiming under the purchasers above mentioned and discussed. Such subsequent owners, who have actual knowledge of the sale and ownership of the abutting submerged lands, would stand in the shoes of their predecessors in title under rules of estoppel. This brings us to the question of bona fide purchasers without knowledge of the sale and ownership of such submerged lands. Whether such subsequent owners have actual notice of such sale and ownership of submerged lands would largely be a matter of fact to be determined from the evidence. However, should it be shown that any such abutting upland owner was without *actual notice* of the sale and ownership of the submerged lands the question of *constructive notice* would arise. Conveyances of submerged lands, under §§253.12, et seq., F. S., are within the intention and purview of Ch. 695, F. S. (recording statutes), and subject to the constructive notice therein provided when recorded in accordance therewith. Persons purchasing abutting uplands, should there be a record of the conveyance of the submerged lands sold and conveyed under and pursuant to §§253.12, et seq., would be charged with constructive notice of such conveyances and the ownership of the submerged lands thereunder. Only in case of unrecorded conveyances made pursuant to §§253.12, et seq., would the question of the rights of purchasers of abutting uplands as against such unrecorded submerged land conveyance arise, and in such case the question of notice would be a question of fact and not of law. Every person purchasing such abutting upland, who is charged with actual or constructive notice of the sale and ownership of submerged lands, would likewise be charged with knowledge of the rights of such owners of said submerged lands, over and to such lands.

Persons purchasing submerged lands under §§253.12, et seq., F. S., and prior statutes and laws, prior to the repeal of §253.15, F. S., (said repeal being effective as of June 11, 1957) acquired such property *with the statutory right* to "bulkhead and fill in same,

as provided by section 309.01, without, however, being required to connect the same with the shore or with a permanent wharf." Purchasers of such lands since said June 11, 1957, acquired no rights under said §309.01 as to bulkheading and filling; their rights being determined by §§253.122, et seq., F. S. It is clear that persons who purchased submerged lands since June 11, 1957, purchased same subject to the regulations of said §§253.122, et seq., F. S. If the application of said §§253.122, et seq., F. S., is more limited or stringent, there would be presented possible constitutional questions, in so far as the requirements of §§253.122, et seq., F. S., may be more stringent, or limits the owner or purchaser's rights, more than did §309.01, F. S. Here we shall presume that the right to bulkhead and fill, under said §309.01, F. S., constituted a part of the contract between the state and the purchasers of submerged lands under and pursuant to §§253.12, et seq., F. S., prior to June 11, 1957, (*Shavers v. Duval County, Fla.*, 73 So. 2d 684, text 689), and that such contract rights inured to those claiming under such purchasers. Such contracts could not be impaired by the repeal of said §§309.01, F. S., or the enactment of §§253.122, et seq., F. S., unless within some exception to said constitutional rule.

It is generally held that the constitutional provision against the impairment of contracts does "not prevent contracts from being subject to legislation enacted by the state in the *proper exercise of its police power* (16 C. J. S. 1284, §281, *Shavers v. Duval County*, supra, text 689-690). The government through the exercise of its police power may impose restrictions upon the use of property in the interest of public health, morals, safety and public welfare (*City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364). This police power is inherent in every sovereignty (16 C. J. S. 889, §174), and the possession and enjoyment of rights and property are subject to the valid exercise of this power (*Sharrow v. City of Dania, Fla.*, 83 So. 2d 274). The protection afforded property rights by a constitutional guarantee may not be construed to mean that the use thereof cannot be regulated under the police power for the general public welfare (*Knowles v. Central Allapattae Prop.*, 145 Fla. 123, 198 So. 819). Although, under §309.01, F. S., (now repealed) purchasers of submerged lands under §§253.12, et seq., F. S., were and still have, notwithstanding the repeal of said §309.01, the right to bulkhead and fill in such submerged lands in accordance with said §309.01; this right is not an absolute one but is subject to the police powers of the state. Conveyances made by the trustees under §§253.12, et seq., as well as former statutes and laws, convey "the legal title, subject, of course, to the state's police power and to the paramount power of Congress over navigable waters, and this deed from the state carried with it the right under the statutes to bulkhead and fill in said lands." (*Pembroke v. Peninsular Term. Co.*, 108 Fla. 46, 146 So. 249, text 260). The purchaser's right under the statute to bulkhead and fill such submerged lands is subject to any applicable police powers of the state. (See opinion of this office of Jan. 3, 1958, (058-3; 1957-1958 A. G. O. 484)). However, this statutory right to bulkhead and fill should not and may not be unreasonably denied by any refusal or neglect on the part of public officials in the establishment of a *lawful* bulkhead line. The statute contemplates the establishment of a lawful bulkhead line, and the establishment of an improper bulkhead line is



the establishment of no lawful bulkhead line. There should be reasonable reasons, from the standpoint of public health, safety and welfare, for its location by the authority mentioned in §§253.122, et seq., F. S. As bulkhead lines, fixed by county or municipal officers under and pursuant to §253.122, are "subject to the formal approval of the Trustees of the Internal Improvement Fund," under said §253.122, it becomes the duty of the trustees, prior to approval, to determine that the bulkhead line as fixed by the local authority complies with the said statutes as well as the rights of the public.

Under said §253.122, the approval, by the trustees of the internal improvement fund, of the bulkhead lines established by local authorities must be a "formal approval." The word "formal" is defined in 37 C. J. S. 115, as "of or pertaining to form, characterized by due form or order, done in due form or with solemnity, regular; relating to matters of form." See also Webster's dictionary. "Formality" is defined more specifically as relating to "the conditions, with regard to method, order, arrangement, use of technical expressions, performance of specific acts, etc., which are required by the law in the making of contracts or conveyances, or the taking of legal proceedings, to insure their validity and regularity." (37 C. J. S. 115). It seems clear that the trustees, in reviewing orders of boards of county commissioners and municipal authorities locating and fixing bulkhead lines, are required, under said §253.122, to review the action of the said boards and authorities and determine whether they conform to the requirements of said §253.122 so as to constitute a lawful bulkhead line. This duty of the trustees seems to require that evidence of the proceeding before the county board or municipal authorities be brought before them so as to enable them to make formal approval as required by the statute. We note that, under §253.122(5), F. S., that it is made the duty of the county board, municipal authorities, or trustees originally fixing the bulkhead line "to cause to be prepared and certified, at the cost of appellant, a transcript of all proceedings including the evidence introduced at such hearing" when appeals are prosecuted to the courts under said subsection. (Emphasis supplied.) This clearly required that a transcript of all hearings relative to the establishment of bulkhead lines be preserved as a part of the record of the proceeding. Before the trustees may properly make formal approval of an order fixing a bulkhead line they should require that the record of the proceedings in the county or municipality, or a duly certified copy thereof, be lodged with them. After the formal approval required by the statute has been made and disposed of the original record, if sent up instead of a certified copy, should be returned to the county or municipality. It is doubted that the trustees have jurisdiction to make formal approval without such record.

The purpose of the thirty day notice required by said §253.122 is to permit interested persons, including purchasers of submerged lands under §§253.12, et seq., and those claiming by, through or under them, to appear and protect their interest, public as well as private, that might be adversely affected by the fixing of the bulkhead lines. Upon the publication of the said notice it becomes the duty of such owners of submerged lands, as well as all other interested parties, to appear and present their views, and otherwise protect their interests, even to the point of seeking court

review of the action of the authority fixing the bulkhead line. It would seem to be the duty of any owners of submerged lands, purchased under §§253.12, et seq., or prior statutes or laws, within the area or areas to be in any way affected by the proposed bulkhead line to appear and protect their interest, and their failure might work an estoppel upon them to subsequently raise the question in court. The proceeding before the authority fixing the bulkhead line seems to be in the nature of an administrative proceeding, whose orders are subject to court review (§253.122(5)), and not unlike in purpose to the notice and proceedings before the trustees in connection with the sale of submerged lands under §§253.13 and 253.14, F. S. From the proceedings establishing bulkhead lines, under and pursuant to §§253.122, et seq., there is raised the presumption that the public officers locating or fixing such bulkhead lines "being public officials of the state, complied with their duty under the law, and that they correctly ascertained the facts warranting their action. This presumption is to all intents and purposes a conclusive one when attempted to be put in issue by a collateral attack in a suit between private parties . . ." (*Pembroke v. Peninsular Term. Co.*, 108 Fla. 46, 146 So. 249, text 258). Proceedings before county or municipal officers, when determining and fixing bulkhead lines pursuant to said §253.122, are formal, not informal ones, and may be quasi-judicial in some respects, and are subject to review by the trustees of the internal improvement fund, when considering the same for purposes of approval, and by the courts. Such duty to fix a bulkhead line cannot be complied with by the fixing such line at the high or low water mark, one foot off shore or from low water mark, or any other location, unless and until, after a full hearing such a location is dictated from all the evidence and the rights of the public generally, as well as rights of owners of submerged lands. The authority locating and fixing a bulkhead line under §253.122, as well as the trustees when approving the same, should keep in mind the rule announced by the court in *Hayes v. Bowman*, Fla., 91 So. 2d 795, text 801, that "an upland owner must in all cases be permitted a direct, unobstructed view of the channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the channel," in the absence of a waiver or transfer of such rights.

Unless the above rule has been complied with, or unless from the evidence and facts in the record before the trustees of the internal improvement fund and matters of which they may judicially notice from which the trustees may say that the bulkhead is a lawful one, they should not approve the same. Although the right of former purchasers of submerged lands to bulkhead and fill such lands is subject to the police power of the state, they should not be deprived of their right to fill such lands in accordance with former §309.01, F. S., unless such filling would be detrimental, not to private persons, firms or corporations, but to the welfare of the general public. The primary duty of the trustees is to protect the welfare of the general public, and only incidentally are they required to look after the private rights of particular persons, firms and corporations. If the rights or interests of private parties may be adversely affected by the location and fixing of bulkhead lines, it is their duty to appear, pursuant to the notice published pursuant to §253.122, above, and failure to

appear, pursuant to such notice, may well be considered a waiver of their personal and property rights, as distinguished from the general rights of the public. This is true, although it may be said that the trustees of the internal improvement fund, at the time of the sale of the said submerged lands (prior to said June 11, 1957), determined that bulkheading and filling, pursuant to said §309.01, would not *then* have been detrimental to the public.

From the above and foregoing we conclude: (1) that the owner of submerged lands, purchased by the abutting upland owner, pursuant to §§253.12, et seq., F. S., or prior statutes or laws, although such submerged lands may have been separated as to ownership by sale or transfer, may fill such lands if he complies with §253.122, F. S.; however, by reason of the state's police powers in this connection he should not fill such lands until the bulkhead line has been determined and fixed. This answers question 2. (2) The same rule would seem to apply to a person, or those claiming by, through or under him, who purchases submerged lands abutting upon upland with the written consent of the abutting upland owner. (3) That full records of the proceeding fixing and setting bulkhead lines must be preserved, and should be required by the trustees before approval of such lines.

The above observations also answer question 3.

059-192—September 30, 1959

#### TAXATION

#### PIPE LINE COMPANIES—OCCUPATIONAL LICENSES— PUBLIC SERVICE, ETC.—§§205.01, 205.53, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Is a corporation operating a pipe line for the purpose of transporting petroleum and petroleum products, from one location to another in this state, for compensation, for those who apply for such service, subject to our licensing statutes, and if so under which section of the statutes should the license be issued?

2. Where such a pipe line originates in one county and terminates in another, should a license be required for each county wherein the pipe line is located?

The corporate charter of the corporation in question refers to it as a common carrier of petroleum and petroleum products. The pipe line in question originates in one county of this state, running into and terminating in an adjoining county, which is said to be used for the purpose of transporting gasoline and maybe other petroleum products from tankers, and maybe storage, in one location in one said county to storage tanks in the other. It is said to be operated for all the major oil companies who may desire to transport their products to locations along the pipe line. The operation of the said pipe line has all the earmarks of a common carrier (13 C. J. S. 25, §3) or a private carrier (13 C. J. S. 31, §4). "Pipe line companies, operating such lines as a public business for hire, are common carriers; but where they transport oil under private contract for particular persons they are not common carriers" but private carriers (13 C. J. S. 41, §11; 13 C. J. S. 31, §4). "The business of common carriers is one which may properly be subjected to the payment of an occupation, privilege or li-

license tax" (13 C. J. S. 56, §20). Common carriers are businesses within the purview of §205.01, F. S., and required thereby to obtain a license and pay a license tax as a condition to transacting business in this state.

Section 205.53, F. S., requires that "every person engaged in any business, as owner, agent or otherwise, that performs some service for the public in return for a consideration, shall for each place of business pay a license tax" as therein provided. The operation of a pipe line as a common carrier is the performance of a service for the public for a consideration (Black's Law Dictionary; *Richter v. City of Lincoln*, 136 Neb. 289, 285 N. W. 593, text 597; 73 C. J. S. 279; 35 Words and Phrases 337-340), so as to require licensing under §205.53, F. S. These observations answer question 1.

Section 205.01, F. S., requires each business, profession or occupation, to procure the required license "from the tax collector of the county wherein the place of business may be located, or where the profession or occupation may be engaged in." Here the business extends from one county into another; the business is transacted from one county into another; there are pumping stations in one county and a receiving and storing station in the other. Section 205.01 above mentioned appears to require an occupational license for each place of business conducted within a county, so that where a business extends into one or more other counties an occupational license is to be required for each such place of business. A license to operate a *place of business* does not authorize the licensee to conduct more than one place of business (*American Locker Co. v. Long Beach*, 75 Cal. App. 2d 300, 170 P. 2d 1005; *Brown v. State*, 177 Md. 321, 9 A. 2d 209). This leads to the conclusion that an occupational license may be required of the pipe line company by each county wherein located.

Employees of the company located and working in one county should not be counted when determining the amount of the license tax payable in the other, although the basic tax would be payable in each said county. These observations answer question 2.

059-193—September 30, 1959

**CITIES AND TOWNS  
NON-DISABILITY RETIREMENT FOR VOLUNTEER  
FIREMEN—§§175.11, 175.15, F. S.**

To: *Harry T. Newett, City Attorney, Delray Beach*

**QUESTION:**

**Does a board of trustees of a firemen's relief and pension fund have the authority to determine the amount of a nondisability retirement pension for a volunteer fireman who has 25 or more years of accredited service?**

In the letter from the municipal director of finance which was attached to your inquiry some question was raised as to whether nondisability retirement for volunteer firemen was authorized under the provisions of §175.11 or §175.15, F. S. In A. G. O. 058-105, p. 612 of the 1957-58 biennial report of the attorney general, it was pointed out that retirement benefits were available to regular firemen under the provisions of §175.11 (1), F. S., and that retirement benefits were available to volunteers under the provisions of §175.15, F. S. By way of clarification it should be pointed out that the disability pensions for both regular and volunteer fire-



men are provided for in §175.11 but §175.15 is the only section authorizing *non-disability* retirement pensions for volunteers.

In passing it should be pointed out that the board of trustees does, under the provisions of §175.15, have the authority to determine whether or not a volunteer will receive any pension and if he is to receive a pension, they have the authority to determine the amount thereof up to the maximum of \$100 per month. Should the board of trustees desire to base a volunteer's retirement pension on the income received by a volunteer for the two years immediately preceding his enrollment as a pensioner it may do so. However, since volunteers in a good many cases receive little or no income a pension based on such figures might be inequitable and, therefore, the legislature has authorized the board of trustees of the firemen's relief and pension fund to exercise its own discretion in determining the amount of pension which a volunteer fireman may receive *after 25 years* of duly accredited and enrolled service and attaining age 55 so long as said pension does not exceed the maximum of \$100 per month.

059-194—September 30, 1959

#### CRIMINAL PROCEDURE

JUDGMENT AND SENTENCE—REPEATED CONVICTIONS FOR FORGING NAME OF SAME PERSON—CRIMES COMMITTED BEFORE AND AFTER EFFECTIVE DATE OF CH. 59-31, AMENDING §831.01, F. S.—§§811.021, 775.06, 775.08, 921.16, F. S.

To: Dan R. Warren, Justice of the Peace, Daytona Beach

#### QUESTION:

When a defendant is convicted on 12 different charges of forging the name of the same person to 12 checks at 12 different times and places, can he be sentenced in each case to serve the maximum term of imprisonment and/or to pay the maximum fine provided by statute?

I think that a person commits 12 different offenses when he forges 12 checks at separate times and places, even though the same individual's name is forged to each check, and that such person is subject to the maximum penalty provided by statute for each forgery.

If any of the forgeries were committed prior to May 9, 1959, the effective date of Ch. 59-31, which amended §831.01, F. S., relating to forgery, then they were felonies and can be tried only in the circuit court of your county, regardless of the amounts of the checks. (§32, Art. III, State Const., and *Turner v. State*, 99 So. 334).

As to the forgeries of checks committed on or after May 9, 1959, Ch. 59-31 requires that the punishment be the same as for larceny. I interpret this as evidencing the legislature's intent that if the check is for less than \$100, the penalty shall be imprisonment in the county jail not exceeding six months or by fine not exceeding \$300, and that where the amount of the check is \$100 or more, the penalty shall be imprisonment in the state prison not exceeding five years or in the county jail not exceeding 12 months or fine not exceeding \$1,000. These are the penalties provided for larceny by §811.021, F. S. I will apply that interpretation in this opinion because any other interpretation would render meaningless the provision of Ch. 59-31 specifying the penalty for forging a worthless check.

Although §811.021 provides for fine *or* imprisonment, both may be imposed (§775.06, F. S.).

Since the penalty for forging a check for less than \$100 on or after May 9, 1959, is neither death nor imprisonment in the state prison, the offense is a misdemeanor, but the forgery of a check for \$100 or more on or after that date is a felony because the offender may be sentenced to the state prison. (§775.08, F. S.)

As to each forgery of a check for less than \$100, committed on or after May 9, 1959, it is my opinion that the defendant can be sentenced to serve the maximum imprisonment of six months in the county jail and/or to pay the maximum fine of \$300, or any part thereof. In other words, the total of the penalties which can be assessed against a person committing 12 such misdemeanors in 72 months in the county jail and/or \$3600 in fines.

I note that your letter speaks of "12 individual counts," but then says that all 12 are based on 12 different warrants and affidavits. If, in fact, the 12 offenses are misdemeanors and are charged in separate counts of the same affidavit, the appellate courts would probably hold that §921.16, F. S., applies, even though it does not mention affidavits before justices of the peace, with the result that jail sentences under two or more counts would run concurrently unless the court expressly directs that they or some of them be served consecutively. If said statute should be held to apply, and if there are separate affidavits but the cases are consolidated for trial, all jail sentences imposed will run concurrently unless the court expressly directs that they or some of them be served consecutively. Therefore, whether there is only one case made by a 12-count affidavit, or whether there are 12 cases made by separate affidavits and they are consolidated for trial, I suggest that, if you wish the jail sentences to run consecutively, the only safe thing to do is to expressly so direct.

If there are 12 cases made by separate affidavits, and if there is no consolidation for trial, said §921.16, if held applicable, will cause jail sentences imposed in such cases to run consecutively unless it is expressly directed that they or some of them be served concurrently. However, in order to guard against the possibility that said statute might be held inapplicable, I suggest that if you wish a jail sentence in one case (for example, your case 3783) to run consecutively to a previously pronounced jail sentence in another case (for example, your case 3782), it would be well to adjudge the defendant guilty and sentence him in case 3783 and then specify that the sentence shall run consecutively to the sentence in case 3782 by adding substantially the following words to the sentence in case 3783, which words are adapted from a form approved by the supreme court in *Lake v. McClelland*, 134 So. 522, to-wit:

And, whereas, on the \_\_\_\_\_ day of \_\_\_\_\_, 1959, this Court adjudged you, \_\_\_\_\_, guilty of the offense of forgery of a check for less than one hundred dollars, as charged in an affidavit filed in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 1959, in Case No. 3782, and sentenced you to serve \_\_\_\_\_ months in the county jail for said offense, it is therefore now ordered and adjudged that the sentence herein imposed shall begin to run from the date of completion of that former sentence above referred to, unless that for-

mer sentence shall be sooner abated or for any cause vacated, whereupon the sentence here imposed shall then begin.

Therefore, your question is answered in the affirmative, subject to the foregoing comments.

059-195—September 30, 1959

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
HOTELS AND RESTAURANTS—REFUSAL TO SERVE AND  
EJECTION OF UNDESIRABLE GUEST—§509.141(1)-(4), F. S.**

To: *Richard E. Gerstein, State Attorney, Dade County, Miami*

**QUESTIONS:**

1. May a restaurant owner lawfully refuse to serve a guest when, for one reason or another, it determines that it would be injurious to the reputation, dignity or standing of the establishment to entertain such guest, even though the guest in question has engaged in no misconduct?

2. Is a guest of a restaurant, who has engaged in no misconduct, guilty of a misdemeanor under §509.141 (3), F. S., when he refuses to depart, upon request, from the premises where the management for one reason or another determines that it would be injurious to the reputation, dignity or standing of the restaurant to entertain such guest?

3. May a guest of a restaurant, who has engaged in no misconduct, be ejected, forcibly if necessary, by a law enforcement officer of this state, when the management of the restaurant, who has determined for one reason or another that it would be injurious to the reputation, dignity or standing of the restaurant to entertain such guest after such guest has been requested to depart from the premises and he has refused to depart?

Section 509.141, F. S., relates to the ejection of undesirable guests and provides for notice and procedure for ejection of such persons.

Section 509.141(1), F. S., gives the manager or person in charge of any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court the right to remove or cause to be removed or ejected from the premises of these establishments any guests who, while in the establishment, or on the premises (1) is intoxicated, immoral, profane, lewd or brawling, (2) who indulges in language or conduct (a) such as to disturb the peace and comfort of other guests of the establishment, or (b) indulges in language or conduct such as to injure the reputation or dignity or standing of the establishment, or (3) *who, in the opinion of the management, is a person whom it would be detrimental to such establishment for it any longer to entertain.*

Section 509.141(2), F. S., provides for giving an undesirable guest notice to leave the establishment and subsection (3) makes it a misdemeanor on the part of the person on having been requested to leave to continue to remain on the premise. That section provides specifically as follows:

And any guest who shall remain or attempt to remain in

such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises.

Section 509.141(4), F. S., provides that if any guest or former guest or other persons shall be illegally upon the premises, that is to say, he has been requested to leave and has disregarded the request, then the management or person in possession and control of the establishment may call to his assistance a law enforcement officer, and upon the request of the hotel, apartment house, restaurant, etc. management it is the duty of the law enforcement officer to forthwith eject, forcibly, if necessary, the person illegally upon the premises of the establishment.

In North Carolina similar questions arose with respect to a statute which imposed a criminal penalty for interfering with the possession or right of possession of real estate privately held, which statute placed no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The North Carolina statute and the Florida statute, from the legal point of view, are quite similar.

In the case of *State v. Clyburn* (N. C.), 101 S. E. 2d 295, seven persons were convicted under the statute imposing criminal penalties for interfering with the possession or right of possession of realty privately held. The case was appealed to the supreme court of North Carolina and that court held that refusal of the proprietors of an ice cream and sandwich shop to serve negroes in the portion of the shop reserved for white clientele impaired no rights of the negroes under the 14th amendment to the federal constitution.

This 1958 opinion by the supreme court of North Carolina is a well-written and exhaustive study of the questions presented in your request. The court in that opinion said:

Our Statutes, G. S. §§ 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.

Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the *Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: "It is state action of a particular char-



acter that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect." In *United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court quoting from *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 said:

"The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty."

More than a half a century after these cases were decided the Supreme Court of the United States said in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A. L. R. 2d 441:

"Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

This interpretation has not been modified: *Collins v. Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of Columbia v. Thompson Co.*, 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams v. Yellow Cab Co.*, 3 Cir., 200 F. 2d 302, certiorari denied *Dargan v. Yellow Cab Co.*, 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385. *The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation.* *Madden v. Queens County Jockey Club*, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; *Terrell Wells Swimming Pool v. Rodriguez*, Tex. Civ. App., 182 S. W. 2d 824; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; *Younger v. Judah*, 111 Mo. 303, 19 S. W. 1109; *Goff v. Savage*, 122 Wash. 194, 210 P. 374; *De La Ysla v. Publix Theatres Corporation*, 82 Utah 598, 26 P. 2d 818; *Brown v. Meyer Sanitary Milk Co.*, 150 Kan. 931, 96 P. 2d 651; *Horn v. Illinois Cent. R. Co.*, 327 Ill. App. 498, 64 N. E. 2d 574; *Coleman v. Middlestaff*, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; *Fletcher v. Coney Island*, 100 Ohio App. 259, 136 N. E. 2d 344; *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G. S. §15-41. (Emphasis supplied.)

In a 1956 case, *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, affirmed per curiam U. S. circuit court of appeals for

the 3rd circuit in an opinion released April 4, 1957, a jockey, Robert J. Martin, attempted to enjoin the Monmouth Park jockey club from refusing him permission to ride mounts racing at the said jockey club. The court said:

Plaintiff's argument seems to consist of two parts:

(1) the defendant Club as a quasi-public corporation may not arbitrarily exclude him, and

(2) his license from the New Jersey Racing Commission, under the Rules of the Commission, gives him a right to ride at any track in the state at which he can secure a mount regardless of the wishes of the owner of the track. Neither point has merit. Although it is intensely regulated, the defendant Club is a private organization. Nothing is more elementary than its right as a private corporation to admit or exclude any persons it pleases from its private property, absent some definite legal compulsion to the contrary. . . . (Emphasis supplied.)

In *Williams v. Howard Johnson Restaurant*, decided by the U. S. circuit court of appeals, 4th circuit, July 16, 1959, it was held that a state-licensed restaurant located on an interstate highway violated neither the 14th amendment nor the commerce clause by refusing to serve a negro. The court referred to the Virginia statute making it unlawful to operate a restaurant in the state without an unrevoked license and said:

The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment . . . A restaurant is not engaged in "interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant . . . is at liberty to deal with such persons as it may select."

(See also 10 Am. Jur. 911-917, §§18-24; 14 C. J. S. 1165-1170 §§7-9.)

Predicated expressly upon these current controlling decisions of the courts cited above and particularly those emanating from the federal judiciary construing the 14th amendment of the U. S. constitution, it is our opinion that your questions necessarily must be answered in the affirmative.

059-196—September 29, 1959

#### SCHOOL CODE

FINANCIAL ACCOUNTS AND EXPENDITURES—INCURRENCE OF INDEBTEDNESS PAYABLE IN ANNUAL INSTALLMENTS—§§237.25-237.27, F. S.; § 18, ART. XII, STATE CONST.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

#### QUESTION:

May a county school board purchase a tract of land to be paid for in annual installments over a period of five years?

Section 237.25, F. S., provides:

*Purposes of and procedures in incurring school indebtedness.*—Indebtedness for school purposes may be incurred only as follows:

(1) School districts may issue bonds creating a long-term indebtedness as prescribed by law.

(2) Notes may be issued for money borrowed in anticipation of the receipt of current school funds, included in the budget from the state, county, or districts, as authorized under §237.26.

(3) Indebtedness may be incurred for certain purposes as authorized under §237.27.

(4) Bonds or revenue certificates issued on behalf of the county by the state board of education as authorized by §18, Art. XII of the constitution.

Since a contract to purchase land extending over a five-year period would incur school indebtedness and is not authorized by the above cited act, your question must be answered in the negative.

We formerly believed that a school board could purchase land subject to an existing mortgage without a violation of the constitutional inhibition against creating indebtedness without consent of the freeholders. This procedure, which was commonly followed for many years, was overruled by the Florida supreme court, however, in the case of *Hollywood, Inc., v. Broward County*, 1956. In that case the court held: (90 So. 2d 47)

Where county acquires property subject to mortgage, mortgage becomes charge against property and county is placed in position of being coerced to meet annual requirements for interest and maturing principal under mortgage, and there is a violation of intent of constitutional inhibition against creating indebtedness without consent of freeholders.

059-197—October 2, 1959

### CRIMES

#### VIOLATION OF STATE LOTTERY LAWS—NEWSPAPER FOOTBALL CONTEST

To: *Richard E. Gerstein, State Attorney, Miami*

#### QUESTION:

Would a football contest which is contemplated by a local newspaper constitute a violation of the lottery laws of this state?

From the information which you have furnished me, it would appear that the newspaper would conduct this football contest by publishing an entry blank in one of its issues in which it would list an unspecified number of football games which were to be thereafter played, and offer a prize to the person picking the most results correctly. In the case of a tie, provision was made for the tie to be broken by awarding the prize to the contestant who came the nearest to guessing the total yardage gained in one of the football games listed on the entry blank.

On Feb. 1, 1952, in an opinion numbered 052-33 and on Sept. 25, 1957, in an opinion numbered 057-310, this office considered almost identical questions and rendered an opinion that the contest described would constitute a lottery.



As you know, a lottery contains three elements, to-wit: (1) a prize (2) an award by chance and (3) a consideration.

The contest which you describe obviously contains a prize.

Even though some judgment and skill are involved in forecasting the results of the football games specified in the entry blank, I think that chance predominates over skill and the contest is essentially a guessing contest. Where chance predominates over skill, the element of chance which is essential to a lottery is present (34 Am. Jur. 649-650, Lotteries, §6; 54 C. J. S. 846-847, Lotteries, §2b (2)) and guessing contests are generally held to be lotteries (54 C. J. S. 857, Lotteries, §10b; 34 Am. Jur. 655-656, Lotteries, §12). Therefore, it is my opinion that the said contest contains the requisite element of chance just as much so as far as the law is concerned as if the winner were determined by drawing numbers from a hat.

The element of consideration in the contest as outlined is apparent when compared with the reasoning of the Florida supreme court in the case of *Little River Theatre Corp. v. State*, 135 Fla. 854, 185 So. 855. Here, the consideration stems from the fact that the purchaser thereof in return for the price paid for the newspaper is, in addition, purchasing a right to compete for the prize offered in the contest. Moreover, it is felt that the inducement to the general public to purchase the newspaper conducting the football contest and thereby enhancing the value of this business to its owner, is obvious.

Therefore, I am of the opinion that your question should be answered in the affirmative.

059-199—October 2, 1959

### COURTS

#### JUVENILE COURTS—DUTIES AND OBLIGATIONS OF SHERIFFS—CH. 39; §§39.03, 39.16, 39.17(4), F. S.; §12, ART. V, STATE CONST.

To: *John A. Madigan, Jr., Florida Sheriffs Bureau, Tallahassee*  
QUESTIONS:

1. Under the provisions of Ch. 39, F. S., relating to juvenile courts, and particularly §39.03, what is the duty of the sheriff in connection with making investigations of matters involving juveniles prior to referring such matter to the jurisdiction of the juvenile court?

2. If a sheriff were to be ordered by a juvenile judge to cancel, rescind, and revoke all commissions as deputy sheriff issued to any and all counselors or assistant counselors of the juvenile court, would the sheriff be required to comply with such order, since it is my understanding that the deputizing of persons is a matter within the sole discretion of the sheriff?

3. Could a juvenile judge require the sheriff to appoint a counselor a deputy sheriff, if the sheriff were not in agreement with such appointment?

Section 39.03, F. S., authorizes a sheriff as a law enforcement officer to take a child into custody where ordered to do so by the juvenile judge or without being so ordered where he finds the child in such condition or surroundings that the welfare of the child requires it immediately being taken into custody or the child shall

be alleged to have committed a violation of law. In addition the statute requires a sheriff taking a child into custody to forthwith make a full written report to the juvenile court, stating the facts by reason of which the child was taken into custody. It follows that the answer to your question 1 is that the sheriff should make such investigation as to satisfy himself he should take the child into custody and to enable him (the sheriff) to make said written report.

Counselors and assistant counselors are selected and discharged pursuant to the provisions of §39.16, F. S., which prescribes duties in such regard to be exercised by the juvenile judge, the counselor and the juvenile court merit board. Counselors and assistant counselors shall be subject to discharge for good cause only pursuant to rules adopted by the juvenile court merit board and approved by the judge. (§39.16(4)).

Section 39.17(4) provides:

If approved by the judge, a counselor or assistant counselor may be appointed a deputy sheriff by the sheriff of the county wherein the court is established, or in the case of a district court by the sheriff of any county within the district.

It is noted a counselor or assistant counselor may be appointed a deputy sheriff with the approval of the juvenile judge. Joint action is required. Once commissioned a deputy there appears no statutory authority in the judge to revoke the deputy commission. As in the case of other deputies we think revocation of the counselor's deputy commission lies in the power of the sheriff. This is not to say that a counselor who has been commissioned a deputy sheriff could not be discharged as a counselor for good cause pursuant to rules adopted by the merit board. Such a procedure may be the only way a judge could relieve himself of a counselor who refuses to resign his deputy's commission contrary to the judge's wishes.

It is, therefore, our opinion that you would not be required or obliged to comply with the judge's order of revocation although it would be within your prerogatives to give your voluntary consent to the order. This answers question 2.

Although §39.17(4), F. S., authorizes the appointment of juvenile court counselors and assistant counselors as deputy sheriffs, with the approval of the juvenile judge, such section and subsection are not mandatory upon the sheriff, but are directory only. There is nothing in Ch. 39, F. S., or §12, Art. V, State Const., requiring that juvenile court counselors and assistant counselors be deputy sheriffs or general police officers, although said §39.17(4), F. S., permits them to be such. Although the legislature, by said §39.17(4), finds no objection to such counselors and assistant counselors being deputy sheriffs, it made no such requirement but merely authorized same when jointly agreed to by both the sheriff and the juvenile judge. Question 3 is answered in the negative.

059-200—October 5, 1959

#### MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—§§324.121 AND 324.051

(2), F. S. EFFECT OF DISCHARGE IN BANKRUPTCY—

§§324.021(7), 324.031, 324.131, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. Does a discharge in bankruptcy relieve an unin-

sured motorist from the requirements of the financial responsibility law where the driving and registration privileges of such person have been suspended pursuant to the provisions of §324.121, F. S.?

2. Does a discharge in bankruptcy relieve an uninsured motorist from the requirements of the financial responsibility law where the driving and/or registration privileges of such person have been suspended pursuant to the provisions of §324.051(2), F. S.?

#### AS TO QUESTION 1:

. . . a discharge in bankruptcy "shall release a bankrupt from all of his provable *debts*, whether allowable in full or in part, except such" as are excepted in the . . . clauses of the section (section of the bankruptcy act) . . . (6 Am. Jur. Bankruptcy, pp. 980-1, §743, citing therein Bankruptcy Act, §17 (USCA, title 11, §35).) (Emphasis supplied.)

Strictly speaking, the discharge does not cancel or extinguish the bankrupt's obligations, but *simply bars their enforcement or collection by legal proceedings*. Hence, it constitutes a perfect defense to an action on a debt barred thereby . . . (8 C. J. S. Bankruptcy, pp. 1491-2, §559 (a).) (Emphasis supplied.)

Where the license and registration privileges of any person, or any nonresident's operating privilege, have been suspended by the commissioner, based upon receipt by said commissioner of a certified copy of the judgment, the judgment debtor is required to furnish proof of financial responsibility as provided in §324.031, F. S., and maintain such proof of financial responsibility for a period of three years. (§324.121(2), F. S.)

Under the provisions of §324.131, F. S., the license suspension based upon a judgment may not be renewed nor shall any license or registration be issued in the names of such persons unless and until every such *judgment is stayed*, satisfied in full or to the extent of the limits stated in §324.021(7), F. S., and *until such person gives proof of financial responsibility, as provided in §324.031, F. S.*, such proof to be maintained for three years.

A discharge in bankruptcy for all practical purposes operates as a stay of judgment because such discharge well pleaded is a bar to the enforcement or collection of a debt based upon a judgment.

In my opinion an uninsured motorist, whose driving and registration privileges have been suspended based on an unsatisfied judgment, is not relieved from complying with the requirements of the financial responsibility law because of the language found in §324.131, F. S.; i.e., *and until such person gives proof of financial responsibility, as provided in §324.031, F. S.*

Question No. 1 is therefore answered in the negative and an uninsured motorist who has received a discharge in bankruptcy staying a judgment upon which his driving and registration privileges have been suspended would be required to furnish proof of financial responsibility prior to reinstatement of such privileges.

#### AS TO QUESTION 2:

Suspension under §324.051(2), F. S., is *not* based upon an unsatisfied judgment against the uninsured motorist. Hence, a discharge in bankruptcy could have no effect on the necessity of such uninsured motorist to comply with the requirements of the

financial responsibility law for reinstatement of his driving and operating privileges where such privileges would be revoked under this section. Question 2 is therefore answered in the negative.

059-201—October 7, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
COUNTY FUNDS—PAYMENT OF EXPENSES INCURRED IN  
ATTENDING FLORIDA PROSECUTING ATTORNEYS ASS'N**

To: *Richard E. Gerstein, President, Florida Prosecuting Attorneys Ass'n, Miami*

**QUESTION:**

**May the expenses incurred by prosecuting attorneys in attending semi-annual meetings of the Florida prosecuting attorneys association lawfully be paid from public funds?**

In opinion 051-303 (A. G. O. 1951-1952, p. 51) I expressed the opinion that dues paid by the sheriffs of this state to the Florida sheriffs association are a proper charge against the expense of the sheriffs' office. In said opinion I stated:

Courts have also ruled that the attendance of public officers upon meetings and conferences held with other officers of other jurisdictions for the purpose of discussing and settling problems of mutual interest, constitute a proper expense payable out of public funds as having been performed in the course of official duties. For example, in the case of *Adams v. Lott*, 112 Fla. 49, 150 So. 596, our supreme court held that a board of county commissioners could pay the expense of having any of its members attend the state road department public hearings to offer suggestions or complaints as to why the budget should include repairs to the roads or bridges in their counties.

In further support of this theory, it must be noted that it has been the practical departmental construction of most state agencies and county officials for many years to recognize and pay dues to official organizations as legitimate expenses of the office, and, insofar as I am aware, this practice has never been questioned by the state auditor, comptroller or other agency having supervision of public funds.

Based on the foregoing authorities, then, it appears to me that if the Florida sheriffs association meets the requirements established, i.e., that it is organized in the interest of the public welfare, that its activities relate to official duties and powers, that it benefits the people generally, and its dues are reasonable and used for legitimate purposes, then the expenditure of funds to defray the cost of reasonable dues or membership fees would be a proper charge against the expenses of the sheriff's office. As I understand the functions of the association, it appears to meet these requirements, for it must be recognized that the advancement of law enforcement through the mutual exchange of ideas, techniques and information, the establishment of uniform procedures, methods of mutual assistance and cooperation, and the sponsoring of training courses, etc., all of which activities are conducted by the



association, contribute to the public welfare and directly benefit the people generally by promoting better law enforcement among the various sheriffs of the state. Therefore, it is my opinion that your first question may be answered in the affirmative.

In opinion 054-92 (A. G. O. 1953-1954, p. 19) I expressed my views as follows in discussing questions as to whether the board of county commissioners could pay the necessary expenses of the clerk of the circuit court while attending the Florida county clerks association, and the necessary expenses of an officer of said association in attending a duly called meeting of the officers thereof:

Your attendance at a convention of county clerks pertains to the affairs of your office, and not to the business of the board of county commissioners. Unless your travel is on behalf of and under the direction of the board of county commissioners, I know of no authority by which your expenses can be paid by that board. As stated above, it seems to me that you must look solely to the income of your office for the payment of your necessary expenses.

In opinion 056-320 (A. G. O. 1955-1956, p. 908) I held that dues paid by county and prosecuting attorneys to the national association of county and prosecuting attorneys were properly payable from county funds.

In opinion 058-89 (A. G. O. 1957-1958, p. 587) I discussed the question of whether county officers who are also officers or committeemen of the various county officers' associations may charge to their respective offices expenses incurred in attending the various association meetings and/or committee meetings. I pointed out that the ultimate test of whether expenses incurred in attending meetings of county officers' associations are properly expenses of the attending official's office is whether a beneficial county purpose is served. I pointed out that my comments dealt with those officials having funds incorporated in their budgets for reimbursement of actual expenses incurred in connection with the operation of their offices, as well as to those officials whose offices are operated on a fee system basis.

In opinion 058-278 (A. G. O. 1957-1958, p. 826) I discussed the question of whether a board of county commissioners may reimburse the clerk of the circuit court and designated deputy clerks for their travel expenses in connection with their attendance at meetings of the Florida county finance officers association. In that opinion, I said:

Inasmuch as the purpose of the county finance officers association to promote public interest in county finance matters and to secure uniform accounting records, reports, and financial practices in the several counties of the state serves a valid county purpose in that it contemplates a better understanding of and a more orderly and uniform program for the administration of county financial affairs, I am of the opinion that if the board of county commissioners deem it in the best interest of their county to send the clerk of the circuit court and his appropriate deputies to the association meetings as representatives of the county, the board would be authorized to reimburse the clerk and deputies attending such meetings for reasonable travel expenses thereby incurred.

In the light of the above mentioned opinions, and under the facts related in your said letter, I think that the attendance of prosecuting attorneys at semi-annual meetings of the Florida prosecuting attorneys association would serve a beneficial state or county purpose, as the case may be, and that the necessary expenses of such attendance are properly payable out of public funds under the following circumstances:

1. Where a prosecuting attorney has funds budgeted by the county for the expenses of operating his office, and where such budget permits payment of expenses necessarily incurred in attending semi-annual meetings of the Florida prosecuting attorneys association, such expenses may be charged to the expenses of operating the office.

2. As to the prosecuting attorneys who do not operate on budgets and whose expenses are not paid out of the state treasury, the county commissioners have the discretionary authority to pay the necessary expenses of such prosecuting attorneys in attending semi-annual meetings of said association, if funds are available for that purpose.

3. As to prosecuting attorneys whose expenses are paid from the state treasury, i. e., state attorneys, and assistant state attorneys other than those whose expenses are paid out of Dade county funds, it would be proper for the state comptroller to issue warrants to reimburse them for the necessary expenses incurred in attending such meetings, provided that the amounts appropriated by the legislature for their expenses are sufficient to permit such payment. However, in this connection, Hon. Lewis H. Tribble, attorney for the comptroller, advises that no funds will be available to pay the expenses of such prosecuting attorneys in attending any meeting of said association except the biennial meeting called by me for the purpose of considering proposed legislation and making recommendations to the legislature. Therefore, I see no way for such prosecuting attorneys to obtain reimbursement for their expenses in attending any meeting of the association held during the current biennium, except said biennial meeting.

059-202—October 7, 1959

#### SCHOOL CODE

COUNTY SCHOOL SYSTEM—INSTRUCTIONAL PERSONNEL  
—RECOMMENDATIONS OF PUBLIC SCHOOL PRINCIPAL—  
§§230.33(7)(d), 230.43(1), (2), 230.03(3), (5), 231.35, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

#### QUESTION:

**Is the recommendation of a public school principal for employment of instructional personnel binding upon the county superintendent in the absence of a showing of good cause for rejection by the county superintendent?**

Section 230.43(1) and (2), F. S., sets forth the normal procedure by which nominations of principals and other members of the instructional staff are made to the county boards. Under subsection (1) the county superintendent recommends the appointment of all principals to the school district trustees, who in turn make nominations to the county board. Under subsection (2) the county superintendent *confers* with the principals pursuant to §230.33

(7) (d), F. S., and recommends the appointment of instructional personnel to the trustees.

The county school board may not reject the nominations made by the school district trustees without showing of good cause (§231.35, F. S.; A. G. O. 052-114, 1951-52 biennial report, p. 368).

In counties where the school district trustees have been abolished, the provisions of the school code relating to their powers and duties are of no legal effect. Therefore, it is necessary to examine the remaining sections of the school code to determine the authority by which instructional personnel may be recommended to the county boards for appointment.

Section 230.03(3), F. S., vests in the county superintendent vast plenary powers in regard to the administration and supervision of the county school system. Section 230.33, F. S., enumerates specific powers and duties of the county superintendent which include recommendations to the county board as to duties and responsibilities to be performed and positions which need to be filled; recommendations as to administrative, supervisory or other assistants, and recommendations as to supervising principals or principals of each school.

By way of comparison, the functions of public school principals set forth in §230.03(5), F. S., provides:

**PRINCIPAL OR HEAD OF SCHOOL.**—Limited responsibility for the administration of any school or schools at a given school center and for the supervision of instruction therein shall be delegated to the principal or head of the school or schools as hereinafter set forth.

An examination of these provisions of the school relating to the respective powers and duties of the county superintendent and the principals reveals no express or implied authority for a principal to issue binding recommendations as to the employment of instructional personnel. This is equally true whether or not the school district trustees have been abolished.

In the absence of such authority, it is my opinion that the county superintendent may accept or reject the recommendations of the principals and, in his discretion, select the person he feels is best qualified for the position.

Therefore, the procedure to be followed in counties having school district trustees is for the superintendent to confer with the principals and then submit recommendations to the trustees. In counties in which the trustees have been abolished, the county superintendents confer with the principals and make their recommendation directly to the county board.

In reaching this conclusion however, the legislative intent and purpose cannot be disregarded. The tenor of the school code dictates full and complete cooperation between the individual branches of the school system. It is the duty of the county superintendent to confer with and carefully consider the recommendations of each principal, but the final decision as to the recommendations properly should be left to the county superintendent, upon whom the over-all responsibility for the efficient operation of the public school system rests.

In view of the foregoing, the answer to your specific question must be in the negative.

059-203—October 7, 1959

## TAXATION

DOCUMENTARY STAMPS—CONSTRUCTION OF §201.02, F. S.,  
 CONVEYANCE BY MORTGAGOR TO MORTGAGEE OF  
 MORTGAGED PREMISES—§§697.01, 697.02, AND  
 201.08; CH. 201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

## QUESTION:

**Where a mortgagor, in full or partial satisfaction of the mortgage indebtedness, conveys the mortgaged premises to the mortgagee, are documentary stamp taxes due on such transaction under Ch. 201, F. S.?**

Although a transaction between the mortgagor and the mortgagee is mentioned in the question as stated it is extended to subsequent holders of the mortgage as well as title to the mortgaged property for the purposes of this opinion. Although such transactions usually cancel the mortgage indebtedness, which in most instances are satisfied of record by the mortgagee-grantee, other transactions and agreements are possible. The question here involved is primarily whether a conveyance from a mortgagor to a mortgagee, in full or partial satisfaction of the balance due and secured by the mortgage, is a deed, instrument or writing "whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction" within the purview of §201.02, F. S. In this state a mortgage is held "to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession" (§697.02, F. S.). Any instrument, whatever its form, given for the purpose of securing an indebtedness, is in law deemed a mortgage in this state (§697.01, F. S.). The issuance of a deed, from a mortgagor to a mortgagee in satisfaction, or partial satisfaction, of an indebtedness secured by a mortgage, is a conveyance of the mortgaged property described in such deed and transfers title to the realty from the mortgagor to the mortgagee.

Under federal tax regulation 113.83, relating to conveyances liable to federal stamp taxes, "(c) A conveyance by a defaulting mortgagor to the mortgagee in consideration of the cancellation of the mortgage debt" is subject to the federal tax, and "the tax is computed on the amount of the mortgage debt plus unpaid accrued interest." See also Annotation in 153 A. L. R. 586-8. Although a documentary stamp tax may have been paid upon the promissory note or other written obligation to pay money, secured by the mortgage, under §201.08, F. S., such payment was not one under §201.02, and would not dispense with the payment of the tax imposed by said section, when a conveyance is made, from the mortgagor to the mortgagee, for the purpose of releasing or satisfying the mortgage and the obligation secured by it.

The above stated question is, therefore, answered in the affirmative. In the absence of a showing that the consideration for the release or satisfaction is otherwise, the tax *should be computed on the unpaid portion of the obligation secured by the said mortgage.*



059-204—October 7, 1959

## TAXATION

OCCUPATIONAL LICENSES—EMPLOYEES OF NONPROFIT CORPORATIONS AND ASS'NS—CH. 205; §§205.01, 205.68, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

## QUESTIONS:

**Are professional employees of nonprofit corporations and associations, including nonprofit hospitals, required to obtain occupational licenses, under Ch. 205, F. S.?**

Under §205.01, F. S., "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or any other law of this state, unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured . . . ." The term "person" as used above includes persons, firms, partnerships, corporations, associations and other entities (§205.68, F. S.). This brings us to the question of when is a person engaging in or managing a business, profession or occupation within the purview and intent of said §205.01. This brings us to the question of whether or not professional employees of a nonprofit corporation, including a nonprofit hospital, are engaged in or manage a business, profession or occupation within the purview and intent of Ch. 205, F. S., so as to require occupational licenses of them. A construction of said §205.01, F. S., and especially the above quoted portion thereof, is required. In connection with the question the services of a physical therapist, who practices his profession as an employe of a nonprofit hospital, was mentioned in your file.

"The term 'business,' 'occupation' or 'trade,' as used in a law imposing a license tax on businesses, occupations, trades, etc., ordinarily means a business, occupation or trade in a commercial sense carried on with a view of profit or livelihood, and embraces everything about which a person can be employed . . ." (53 C. J. S. 556, §27). The court, in *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, discussing the term "business" as used in the Florida licensing statutes, said that "business" is a "word of large significance, and denotes the employment or occupation in which a person is engaged to procure a living. . . . The term 'business' as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit and livelihood." In the *Texas Co.* case it was held that tank cars owned and operated by an oil dealer were not owned and operated for profit as such, but as an adjunct to the oil business, and therefore not a business within themselves. In *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406, the term "occupation" as used in the licensing statutes was construed to be synonymous with the term "conducting business." The fact that a corporation, organized as a nonprofit one under Ch. 617, F. S., operates in this state, does not conclude the question that it may be operated by its incorporators as a means of livelihood, although it makes no profit as a corporation, so as to bring it under Ch. 205, F. S., and require of it an occupational license (*Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608, text 609). Activities carried on by a corporation which benefits its organizers or members constitute "business" within

the meaning of licensing laws (53 C. J. S. 556, §27, note 64).

A test which may be "applied under appropriate circumstances is whether or not the subject of the license tax is engaged in his own business, the business of his employer, or in his business such as would constitute him an independent contractor. If he is an independent contractor holding himself out to be employed by others for a charge, he is subject to the license tax, but if he is the mere servant or employee of another, he is not subject to the license tax." (State v. Nelson, 155 Fla. 399, 20 So. 2d 394, text 395-396). In this case the court held that a full time salaried employee of an insurance company, investigating and adjusting claims for his employer company, was employed as a mere incident to the business of the insurance company and that the license paid by the company covered the services of its employees and servants. (See also 53 C. J. S. 559, §47, notes 60-62).

From the above and foregoing the above stated question is answered in the negative; provided that the persons mentioned are in fact employees and not independent contractors of the non-profit corporation or association. If independent contractors and not employees, the license tax would be due.

059-205—October 8, 1959

#### TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—RACING AND FRONTON PERMITS, FRANCHISES—CHS. 199, 550 AND 551—

§§199.01, 550.04, 550.06, 550.08, 550.081 AND 550.16, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Are dog and horse racing permits, as well as fronton permits, issued under and pursuant to Chs. 550 and 551, F. S., intangible personal property within the purview of Ch. 199, F. S.?**

Pari-mutuel betting on horse and dog racing in this state, except for Ch. 550, F. S., would be gaming or gambling in this state under existing gaming and gambling laws (Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801, 52 A. L. R. 51) and by said laws prohibited. However, this form of gaming or gambling was authorized by Ch. 550, F. S., and fronton gaming or gambling by Ch. 551, F. S. Authorized gaming or gambling is a matter over which the state may exercise greater control, and exercise its police power in a more arbitrary manner than other forms of business, because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest, and those enterprises over which the exercise of police power is not so essential for public welfare (Hialeah Race Course v. Gulf-Stream Park Racing Ass'n, Fla., 37 So. 2d 692). Pari-mutuel betting on horse and dog racing in Florida is not a right but a privilege which may be granted, withheld or withdrawn by the state at its discretion (State v. Stein, 130 Fla. 517, 178 So. 133).

Under Ch. 550, F. S., the racing days or seasons which a racing plant may operate is limited and may not exceed a fixed period of time (§550.08, F. S.) which periods of time are allocated by the state racing commission (§550.081, F. S.). Pari-mutuel racing may be operated in this state only pursuant to permits

issued in accordance with the statutes (§§550.04, et seq., F. S.) and may exist only in such counties as may by vote of their electors authorize same (§550.06, F. S.). Permits for such racing may be cancelled for cause. Racing plants are also limited as to location and distances between each other (§550.081, F. S.). The percentages of the pari-mutuel pools, bet by the public, that may be retained by the race track are limited and regulated (§550.16, F. S.). Similar regulations and licensing provisions apply to fronton betting under Ch. 551, F. S. The permits issued under said Chs. 550 and 551, F. S., are regulatory licenses or in the nature of regulatory licenses, in the nature of franchises, if not franchises (*Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; 37 C. J. S. 146, 151 and 174, §§1, 8 and 24; *Coulson v. Harris*, 43 Miss. 728).

"Licenses, unless mere temporary permits, and franchises are property and subject to tax as such, if within the scope of the constitutional and statutory provisions" of the state authorizing taxation (84 C. J. S. 206, §91). Such a license being neither real nor tangible personal property would not be taxable under the statutes providing for the taxation of such property, and if taxable at all would be taxable under Ch. 199, F. S. This brings us to the question of whether licenses granted horse or dog race tracks, or frontons, under Chs. 550 and 551, F. S., are intangible personal property within the purview of Ch. 199, F. S. "A license is merely a permit or privilege to do what otherwise would be unlawful, and it is not a contract between the authority, federal, state or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right." (*State v. Stein*, 130 Fla. 517, 178 So. 133, text 135). This case was between the state racing commission and certain race tracks, and appears to have considered the status of the license issued to such race tracks under Ch. 550, F. S. Although such a license "confers no more than a personal privilege," it nevertheless gives "to its possessor something which is valuable and which has the qualities of property, and it confers a valuable personal right which generally cannot be denied or abridged except after due notice and a fair and impartial hearing" (53 C. J. S. 641, §42). In *Park-N-Shop, Inc. v. Sparkman*, Fla., 99 So. 2d 571, text 574, the court after referring to the definition of intangible personal property found in §199.01, F. S., remarked that "the interest of the lessee under a lease such as the one under study does not fall in this definition." In *State v. Stein*, 130 Fla. 517, 178 So. 133, text 135, a license was said not to be either property or a property right, but as conferring no more than a personal privilege, although, under 53 C. J. S. 641, §42, it appears to have value. If a leasehold interest does not constitute "property" subject to taxation under the definition contained in §199.01, F. S., it is doubted that the license interest of a race track under Ch. 550, or a fronton under Ch. 551, F. S., would come under said §199.01. Under the usual rule of construing taxing statutes in favor of the taxpayer and against the taxing authority we must answer the above stated question in the negative, until legislation is adopted specifically including licenses of this nature within the purview of Ch. 199, F. S.

059-206—October 8, 1959

**PENSIONS AND WAR VETERANS  
VETERAN'S PREFERENCE IN RETENTION IN  
POSITION—§295.07, F. S.**

To: *Angus Laird, Director, Florida Merit System, Tallahassee*

**QUESTION:**

Are the provisions of §295.07, F. S., requiring veterans preference in retention in position, complied with under the following circumstances?

1. Layoff procedures. Layoffs shall be made in the following manner:

E. When two or more employees have the same combined total of points from seniority credit and service rating credit, the order of layoff shall be determined by giving preference for retention in the following sequence:

(1) The employee who is entitled to veteran's disability preference.

(2) The employee who is entitled to veteran's preference.

Section 295.07, F. S., requires that preference in retention in position shall be given in all establishments, boards, commissions, agencies, political subdivisions and municipalities of the state to:

(1) Disabled honorably discharged ex-servicemen receiving disability compensation under public laws administered by the veterans administration; (2) The wives of such service connected disabled ex-servicemen as have been unable to qualify for any position; (3) Unmarried widows of disabled ex-servicemen; and (4) Ex-servicemen and women honorably discharged who have served on active duty in the armed forces of the U. S. during any war, etc., for which a campaign badge has been authorized.

Examination of the suggested procedure for layoffs which accompanies your inquiry reveals that it contemplates an extremely limited application of the above statute. The veteran's preference contemplated by said procedure does not become applicable unless two or more employees have the same combined total of points from seniority credit and service rating credit. Thus the veteran's preference required by the statute would only become applicable in very unusual circumstances.

In the case of *Yates v. Palmintiero*, 96 So. 2d 148, a vague formula which resulted in no preference being given to the veteran, was held as not complying with the mandatory requirements of §295.07, F. S.

It is my opinion that the holding in the *Yates* case is applicable to the above-quoted sections of the suggested procedure for layoffs as under those provisions the vast majority of ex-servicemen would receive no preference in retention in position.

The question presented is answered in the negative.



059-207—October 8, 1959

**BEVERAGE LAW, ADMINISTRATION AND ENFORCEMENT  
EMPLOYMENT OF MINORS BY SPECIAL RESTAURANT  
LIQUOR LICENSEE IN PORTION OF LICENSED PREMISES  
SEPARATE FROM BAR—§§561.20(2), 562.13 AND 450.071, F. S.**

To: *L. Grant Peeples, Director, State Beverage Department, Tallahassee*

**QUESTION:**

May holders of special restaurant liquor licenses under the provisions of §561.20(2), F. S., be permitted to employ persons between the ages of 18 and 21 years on the restaurant premises where such employees are to be engaged in work apart from the portion of the restaurant property where alcoholic beverages are offered for sale and are served for consumption on the premises?

In order to answer this question it will be necessary to review a portion of the history of the beverage law.

Section 562.13, F. S., makes it unlawful for any vendor of alcoholic beverages who makes sales for consumption on the premises to employ any person under the age of 21 years, and §450.071, F. S. (part of the child labor law), prohibits a person under 21 years of age from being employed or allowed to work in, about or in connection with, a poolroom, billiard room, brewery, saloon, barroom, or any place where alcoholic beverages are sold. Excepted from this, however, are professional entertainers under certain conditions, young persons between 18 and 21 years working as clerks in drug stores, grocery stores and filling stations where beer and wine is sold for consumption *off the premises only*, and bellboys, elevator boys and others under the age of 21 years in hotels where *such employees are engaged in work apart from the portion of the hotel property where alcoholic beverages are offered for sale on the premises*.

There can be no question that the entire hotel, motel, motor court or restaurant, as the case may be, is a part of the "place of business" or "licensed premises." (*Simpson v. Goldworm*, 59 So. 511; *Boynton v. State*, 64 So. 2d 536). Therefore, if young persons between the ages of 18 and 21 years may legally be employed in a restaurant which holds a "special" type liquor license, it must be because said persons are exempted or excepted under §562.13, F. S., and not under any theory that the service bar and dining room where the liquor is kept and served is the "licensed premises" and the kitchen where food is prepared is not in fact a part of the place of business or licensed premises.

Originally the beverage law prohibited the employment of any person under the age of 21 years, whose disabilities of non-age had not been removed, in a place of business of a vendor of intoxicating liquors. The first relaxation of this statute was in 1955 when §562.13, F. S., was amended by Ch. 29964, to allow persons between the ages of 18 and 21 years to perform as professional entertainers in licensed beverage places and to allow persons of this age to be employed by drug stores, grocery stores and automobile service stations where beer and wine were sold by the package for consumption *off the premises only*. This section also allowed hotels to employ bellboys, elevator boys, etc., under the age of 21 years where these young persons were engaged in work apart

from the hotel property where alcoholic beverages are offered for sale for consumption on the premises.

At this point it is necessary to review how the legislature has classified hotels, motels, motor courts and restaurants insofar as issuing liquor licenses are concerned.

Up until May 24, 1947, there was no limitation on the number of liquor licenses that could be issued in the state. Effective that date the legislature passed an act which later became a part of §561.20(2), F. S., which allowed hotels having 50 or more guest rooms to secure a liquor license without regard to the population limitation or the number of licenses issued. Subsequently, motels and motor courts having 50 rooms or more were included in that provision and *restaurants occupying more than 4,000 square feet of space and supplied with certain equipment and meeting other conditions could be issued one of these "special" liquor licenses.*

The legislature has classified hotels, motels and motor courts, having 50 or more guest rooms and restaurants occupying more than 4,000 square feet, in the same category for the purposes of issuing to these particular businesses a "special" type liquor license, and has provided that operators of these businesses can secure a liquor license, notwithstanding the population limitation applied to the ordinary applicant.

This provision classifying hotels, motels, motor courts and restaurants together for purposes of issuing a "special" liquor license was passed in 1953 (Ch. 28117), was codified as §561.20(2), F. S., and was already in the law at the time §562.13 (employment of minors) was amended. Since this amendment allowing the employment of minors to be employed in hotels under certain circumstances made no mention of these large restaurants, it is my opinion that restaurants cannot be considered to come within this exception by implication and therefore your question must be answered in the negative.

059-208—October 8, 1959

#### CRIMINAL PROCEDURE

#### INDETERMINATE SENTENCE—POWERS AND DUTIES OF PAROLE COMMISSION IN CONNECTION WITH PERIOD OF IMPRISONMENT AND PAROLE—

§§921.21, 921.22, 947.21 AND 947.23(1), F. S.

To: Francis R. Bridges, Florida Parole Commission, Tallahassee

#### STATEMENT OF FACTS:

On Sept. 15, 1959, a state prisoner serving an indeterminate sentence of from six months to five years was released on a parole granted by the Florida parole commission, which set the term of parole at two years. The commission has never made any determination of the exact period of imprisonment to be served by said prisoner. Said parolee is now in custody under a charge of violating the terms of his parole, and the parole commission will soon conduct a hearing to determine whether to revoke his parole or to reinstate it.

#### QUESTIONS:

1. If said parole is revoked and the parolee returned to prison, what sentence will he resume?

2. If the parole is reinstated, what will be the status of the parolee insofar as his prison sentence is concerned if and when he successfully completes the two-year term of parole set by the commission?

AS TO QUESTION 1:

Sections 921.21 and 921.22, F. S., which are parts of the indeterminate sentence law, read as follows:

*921.21 Progress reports to parole commission.*—The department shall from time to time submit to the parole commission a progress report on the persons sentenced under §§921.17-921.23, with such recommendations as the department feels necessary to advise the commission on the prisoner's rehabilitation progress. Such reports and other information available to the commission shall assist the commission in making its determination as provided by law. When in the opinion of the classification committee, based on its findings, as provided by this law, the ends of justice, the interests of society, and public welfare shall best be served, and with due regard to the deterrent effect of the example to others who may be like offenders, the classification committee of the department shall recommend to the parole commission, and said commission shall have the power to either place the said prisoner on parole, as provided by law, or to finally discharge the prisoner from custody. *If the prisoner is placed on parole, the period of parole shall be discretionary with the parole commission.* (Emphasis supplied.)

*921.22 Determination of exact period of imprisonment by parole commission.*—The parole commission upon the recommendation of the department shall have the authority to determine the exact period of imprisonment to be served by such defendants sentenced under the provision of §§921.17-921.22; provided, however, that the prisoner shall not be held in custody longer than the maximum sentence as provided by law. (Emphasis supplied.)

Sections 947.21 and 947.23(1), F. S., provide as follows:

*947.21 Violations of parole.*—A violation of the terms of parole may render the parolee liable to arrest and a return to prison to serve out the term for which he was sentenced. No part of the time he may have been on parole shall in such event, in any manner diminish the time of such sentence. (Emphasis supplied.)

*947.23 Action of commission upon arrest of parolee.*

(1) As soon as practicable after the arrest of a person charged with violation of the terms and conditions of his parole, such parolee shall appear before the commission in person, and if he desires he may be represented by counsel, and a hearing shall be had at which the state and the parolee may introduce such evidence as they may deem necessary and pertinent to the charge of parole violation. Within a reasonable time thereafter the commission shall make findings upon such charge of parole violation and shall enter an order determining whether said charges of parole violation have been sustained. *The commission shall in and by said order revoke said parole and return said person to prison to serve the sentence theretofore imposed upon him,*

or reinstate the original order of parole, or shall enter such other order as it may deem proper. (Emphasis supplied.)

Section 921.21 expressly empowers the parole commission, when it paroles a person serving an indeterminate sentence to set the period of parole. Therefore, the commission acted within the scope of its authority when it set at two years the term of the parole of the prisoner mentioned above.

No determination of the exact period of imprisonment to be served by said prisoner having been made by the commission under the authority of §921.22, his sentence remains an indeterminate sentence of from six months to five years, and that is the sentence which he will resume if his parole is revoked and he is returned to prison. This is so because §947.21 provides that a violation of the terms of parole may render the parolee liable to arrest and return to prison *"to serve out the term for which he was sentenced,"* and §947.23(1) requires that if the commission revokes a parole, it shall return the parolee to prison *"to serve the sentence theretofore imposed upon him,"* and because the sentence here involved was from six months to five years and it had not been reduced to a fixed term by the commission. The fact that the term of the parole was fixed at two years does not militate against this conclusion, because the fixing of the term of parole is in no sense a determination of the exact period of imprisonment to be served. AS TO QUESTION 2:

Inasmuch as the commission, with full authorization of law, set said parolee's period of parole at two years, he will stand forever discharged from any further imprisonment under his said sentence if his parole is reinstated and if he succeeds in complying with the terms of his parole until said two-year period has expired.

059-209—October 9, 1959

**CRIMES AND CRIMINAL PROCEDURE**  
**EMBEZZLEMENT BY CONTRACTOR—CONSTRUCTION OF**  
**§§84.01, 84.07(3), 811.021 AND 812.04, F. S.**

To: Warren H. Edwards, County Solicitor, Orange County, Orlando

**QUESTIONS:**

1. Do the provisions of §84.07 (3) define and cover the crime of embezzlement distinct from and independent of the provisions of §812.04, or must the two statutes be considered together, with §84.07 (3) being only directory in nature?

2. Is a contractor, as defined and set forth in the lien laws, including §84.07 (3), an "agent" or "servant" of an owner, so that an information may be drawn and filed under §812.04?

3. May an information be properly filed under §84.07 (3) independent of §812.04?

4. Must a contractor who converts construction loan proceeds to his own use be charged with embezzlement under §84.07 (3) to the exclusion of §812.04?

5. In a prosecution under §84.07 (3) must the state prove the use for other purposes to which the contractor



put the proceeds of payments made to him, or is it sufficient to prove that certain lienors remain unpaid?

AS TO QUESTION 1:

Section 811.021, F. S., has been considered as a legislative revision of the various crimes condemned by certain sections of the Florida Statutes relating to embezzlement. Where the cited section is determined to cover the whole subject matter of an earlier act, such section has been held to repeal the earlier act. (See *Anglin v. Mayo*, Fla., 88 So. 2d 918; *Burton v. State*, Fla., 107 So. 2d 140).

In view of the above, it appears to me that §812.04 was impliedly repealed by the enactment of §811.021.

Section 84.07 (3) makes it a crime for a person, who, with intent to defraud, shall use the proceeds of any payment made to him under a contract providing for the improvement of real estate for any purpose other than to pay for labor or services performed on or material furnished for this improvement while the amount due for same remains unpaid. The cited section is the only statutory provision which I can find which imposes such a duty on the contractor.

Therefore, in the absence of this provision, there would be no duty imposed upon the contractor, other than that which might be imposed by contract, to use funds received by him as payment for improving real property as indicated above.

Section 811.021 (1) (b) condemns as a crime the *conversion by a person of property or money belonging to another* which such person has in his possession, custody or control as a trustee, bailee, servant, agent, etc., to such person's own use.

Inasmuch as §84.07 (3) defines the crime and provides, by reference, a penalty for violations thereof, I am of the opinion that it must be considered as independent of the provisions of §811.021 (1) (b).

AS TO QUESTION 2:

A contractor is defined in §84.01 as a person other than a material man or laborer who enters into a contract with the owner of real property for improving it. Such definition does not contain anything which would indicate that the contractor is also an agent or servant of the owner.

Therefore, question 2 is answered in the negative.

AS TO QUESTION 3:

In view of the answers given to questions 1 and 2, I am of the opinion that an information may and should be filed under §84.07 (3) independent of §811.021 (1) (b).

AS TO QUESTION 4:

If the contractor receives the proceeds as a payment on his contract, then the answer to question 1 would be controlling and he should be charged with a violation of §84.07 (3). However, should there be some agreement between the contractor and the owner whereby the contractor also becomes an agent or broker for the owner with respect to the construction loan, then any prosecution for unlawfully converting to his own use funds entrusted to him as such agent or broker, as distinguished from funds paid to him as contractor, should and must be under §811.021 (1) (b).

AS TO QUESTION 5:

I have been able to find only one case dealing with a prosecution under §84.07 (3). (See *Fiske v. State*, Fla., 106 So. 2d 586).

The cited case is not of much assistance with regard to your question inasmuch as the appellate court held that the state had failed to prove that the defendant was a contractor as defined by Ch. 84.

In accordance with the general rules of criminal law prevailing in the state, the duty would be on the state to prove all of the elements of the crime as defined in §84.07 (3). The elements of this crime as set forth in §84.07 (3) are as follows: (1) intent to defraud (2) the use by a contractor of payment made to him on account of improving real property for any other purpose than to pay for labor or services performed on or materials furnished by his order on such improvement, while any amount for which he may be or become liable for such labor, services, or material remains unpaid.

In view of the above, I am of the opinion that the answer to question 5 should be that the state must prove the use to which the contractor put the proceeds of payment made to him so as to show that he used such proceeds for a purpose other than to pay for services, labor or materials for the improvement of the property on account of which he received the payment.

However, I should like to point out that the elements of the crime may be proved by circumstantial evidence where such evidence is inconsistent with the innocence of the accused and consistent with his guilt. When taken together with other circumstantial evidence, proof that a contractor had not paid certain lienors *might* become one link in a chain of circumstantial evidence which *could* be sufficient to prove the guilt of the contractor.

059-210—October 7, 1959

### CONSERVATION

**AUTHORITY OF STATE CONSERVATION OFFICERS TO MAKE ARRESTS IN ENFORCING MOTORBOAT SAFETY LAW—§§370.02(7), 901.15, 371.161 AND 30.15 AND CH. 371 (CHS. 59-399 AND 59-400), F. S.**

To: Thomas S. Caro, Judge, Criminal Court of Record, Key West  
QUESTION:

**Do state conservation officers have the authority to make arrests in enforcing Ch. 371, F. S., the motorboat safety law?**

As pointed out in your letter, §370.02(7), F. S., provides in part:

All conservation officers, together with the director are constituted police officers with power to make arrests for violations of the laws of this state and the rules and regulations of the board *under their jurisdiction*. The *general laws* applicable to *arrests by peace officers* of this state shall also be applicable to said director and conservation officers. The director or his conservation officers may enter upon any land or waters of the state for the performance of their lawful duties . . . and such entry shall not constitute a trespass. . . . The director or any of his conservation officers shall have the authority, without warrant, to board, inspect, and search any boat, . . . *The director or any of his conservation officers may arrest any person in the act of violating any of the provisions of this law*

*or rules or regulations of the board of conservation.* It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, either by abetting, assisting such resistance or otherwise interfere with said director or any conservation officer while engaged in the performance of the duties imposed upon him by law or regulation of the board of conservation. (Emphasis supplied.)

This office held, in A. G. O. 054-193, reported in 1953-54 biennial report of the attorney general at p. 442, that under §370.02(7) the director of the state board of conservation and his officers are peace officers within the meaning of §901.15, F. S., and as such have authority to arrest, without warrant, under the provisions of the said section. However, it is reasonably clear from the language of §370.02(7) that the primary enforcement responsibility of conservation officers is to make arrests for violations of the laws relating to matters entrusted to the supervision of the board of conservation and the board's rules and regulations. We do not think this statute places the responsibility of general law enforcement in conservation officers as it does in police officers.

Nevertheless we believe conservation officers may make arrests under certain circumstances as hereinafter outlined *incidental* to their primary duties similar to other law officers who are not given primary enforcement responsibility in a particular enforcement field. They also have the right to make citizens' arrests. The extent and limitation of this *incidental* power of arrest of conservation officers is hereinafter developed in respect to the enforcement of the new laws dealing with the registration and regulation of motor boats.

Chapters 59-399 and 59-400 are the motorboat registration and water safety laws, respectively, passed by the 1959 session of the legislature. These acts were originally introduced as one bill, but later divided. Chapter 59-399 places the administering registration of motorboats under the board of conservation. However, the enforcement of this act is not delegated exclusively to the board. In fact it is provided in the act as follows:

*371.161 Rules and regulations.*—The state board of conservation shall make, adopt, promulgate, amend or repeal rules and regulations necessary for carrying out of the administrative duties, obligations and powers conferred on the board by this act; *provided, however, such board shall not have the power to make or adopt rules or regulations providing for the enforcement of this act.* (Emphasis supplied.)

Chapter 59-400, the water safety law, is silent as to any specific enforcement responsibility. For this reason, the responsibility for its enforcement would primarily rest in the general law enforcement officers; that is, the sheriffs and constables.

The water safety statute was enacted as a result of the tremendous increase in the popularity of boating in Florida. The legislature declared motorboats to be dangerous instrumentalities (§3) and both defined and prohibited reckless operation of a motorboat (§1) and the operation of same while under the influence of intoxicants (§2). The act went on to restrict the use of water skis and aquaplanes and made provision for mufflers and maximum safe load. Florida has 30,000 natural lakes and 9,000 miles of ocean coastline. These natural resources are among our chief tourist at-

tractions. The Florida supreme court has recently taken judicial notice of the importance of tourism to the state in the case of *Duval v. Thomas*, in Supreme Court of Florida, No. 29783, in which it said:

We take judicial knowledge of the importance of "tourism" to our state. Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here.

While the legislature did not give specific statutory authority to the department of conservation to enforce the motorboat safety law, it doubtless recognized the magnitude of the problem and must have intended that conservation officers while enforcing the conservation laws and the motorboat registration act should have the incidental power to enforce the regulations on motorboats which it declared to be dangerous instrumentalities. I believe they would have limited arrest authority even as private citizens, irrespective of their duties and responsibilities as conservation officers. There is a conflict in the decisions from other jurisdictions on this point, and many states have resolved the question by statute. There is no statutory authority for arrest by a private citizen in this state, but the rule of common law which is in effect here is that a private person may arrest without warrant one committing a misdemeanor which constitutes a breach of the peace in his presence (6 C. J. S. 606, 607. 1951-52 biennial report of the attorney general, p. 763). This "breach of the peace" has been defined as "that state and sense of safety which is necessary to the comfort and happiness of every citizen, and which government is instituted to secure. It is not the doctrine of the law that there is no breach of the peace unless the public repose is disturbed." (*Malley v. Lane*, 115 Atl. 674, 676).

The New York case of *People v. Reisner*, 295 N. Y. S. 813, seems to be in point. The facts were very similar to those here before us. A New York policeman on special duty with the state industrial commission charged a manufacturer of bedding with a violation of the sanitary laws covering the storing of old mattresses. The defense was that police officers did not have authority to issue summons for this type of violation. The court held that the power to enforce the act was vested by the statute in the industrial commission, but that the policeman had the power to arrest as a private citizen; and in that connection the court, at p. 817, said:

An ordinary citizen has the power of making an arrest where there has been committed, in his presence, a crime, which, of course, includes a misdemeanor. *People v. Averill*, 124 Misc. 383, 208 N. Y. S. 774. It matters not whether the crime is a violation of the municipal or state law. It is the public duty of a citizen to make an arrest where a crime has been committed, or is attempted to be committed, in his presence.

A police officer's arrest may seem more binding and effective because he is outwardly clothed with special evidence of authority, but an arrest by a citizen is just as binding as one by a police officer.

In A. G. O. 051-267, reported in 1951-52 biennial report of



the attorney general at p. 762, this office held that:

An intoxicated person operating a car on the left side of a public highway at a high rate of speed at 12:30 A.M., is guilty of one or more misdemeanors under our statutes. An automobile operated on the public highways of this state has been declared a dangerous instrumentality (*Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629.) In view of such characterization it would appear that the operation of an automobile in the dangerous and careless manner set forth in the first question would constitute a breach of the peace. (Emphasis supplied.)

The only cases in Florida bearing on the problem are *Poole v. State*, 177 So. 195, in which the court simply held that in the stated circumstances the citizen's arrest was valid; and the federal case of *Dorsey v. U. S.*, 174 F. 2d 899, in which the court held that at common law a private person may arrest for a felony committed in his presence.

This office held, in A. G. O. 050-376, dated Aug. 3, 1950, reported in 1949-50 biennial report of the attorney general, pp. 489, 491, that a private individual has the common law right to arrest a person who, in the presence of the arresting individual commits a breach of the peace constituting a misdemeanor.

A conservation officer has the incidental authority to enforce the safety law in regard to violations thereof constituting a "breach of the peace" as delineated above, so long as he does not do so to the detriment of his primary duty as a conservation agent. It goes without saying that this not being his primary duty he should defer to the sheriffs who are, by §30.15, F. S., the conservators of the peace, whenever possible.

As restricted above, it would appear that state conservation officers have the authority and duty to enforce the motorboat safety laws.

059-211—October 19, 1959

**FLORIDA INDUSTRIAL COMMISSION**  
**QUALIFICATIONS FOR POSITION OF CHIEF OF INDUSTRIAL SAFETY**—§§440.56(10), 440.44(4) AND 471.01, F. S.  
*To: Angus Laird, Director, Florida Merit System, Tallahassee*  
**QUESTION:**

Is the position of chief of industrial safety of the Florida industrial commission one that requires licensing by the state board of engineer examiners?

Section 440.56(10), F. S., relating to the appointment of a chief of industrial safety, provides:

The commission shall appoint and fix the salary of a full time chief of industrial safety, who shall be appointed in accordance with the provisions of §440.44(4) (a); provided, however, that no person shall be appointed to such position unless he either has a degree from a recognized college of engineering and the equivalent of eight full years experience in safety engineering or has had the equivalent of ten full years experience in safety engineering. It shall be the duty of the chief of industrial safety, under the direction and supervision of the director of the workmen's compensation division, to enforce the safety provisions of

this chapter and all rules and regulations adopted by the commission pursuant to this section. (Emphasis supplied.)

According to information contained in your request the chief of industrial safety must be qualified and able to plan and coordinate all activities of the industrial safety department of the industrial commission on a state-wide basis, as well as to supervise the work of subordinate safety representatives relating to safety programs in industrial plants and other places of employment. The employee holding this position must necessarily not only be a trained and experienced engineer in industrial safety but also a trained public relations representative.

The legislature recognized the importance of having the industrial commission appoint a trained, experienced and capable individual and, therefore, expressly and specifically set forth his qualifications in §440.56(10), *supra*. These qualifications did not require him to be registered in the state, but did require a minimum number of years actual experience.

The statute with respect to registering persons as engineers is as follows:

**471.01 Purposes.**—It is hereby declared to be the public policy of the state that, in order to *safeguard the life, health, property and public welfare of her citizens*, any person practicing or offering to practice professional engineering in Florida, as hereinafter defined, shall be required to submit evidence sufficient to convince the Florida state board of engineer examiners that he is qualified to practice professional engineering, after which he shall be registered as hereinafter provided. (Emphasis supplied.)

The state board of engineer examiners may examine and license a person who is a graduate from an approved course in engineering of four or more years duration in an approved school or college and who has four years active practice in engineering, or in lieu of this education and experience they may examine and license a person who has a specific record of 10 or more years of active practice in engineering work of a character which indicates that the applicant is competent to be placed in responsible charge of such work.

It would appear that the legislature, in setting forth the minimum requirements for the position of chief of industrial safety, was intent on protecting the public interest and general welfare by requiring the holder of the position to possess more actual experience than would be necessary to meet the board's requirements for examination and licensure and the mere fact that he is not licensed by the board is immaterial so long as he possesses the qualifications required by §440.56(10), F. S., and complies with the rules and regulations set up by the merit system council under the provisions of §440.44(4), F. S.

In 82 C. J. S., §317, p. 554, the rule is stated as follows:

Neither the government, whether federal or state, nor its agencies are considered to be **within the purview of a statute** unless an intention to include them is clearly manifested; and the rule applies, or applies especially to statutes which would impair or divest the rights, titles, or interests of the government.

The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive

the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. Your question is therefore answered in the negative.

059-212—October 19, 1959

#### WITNESSES

EXPERT WITNESSES—CONSTRUCTION OF §90.231, F. S., AS AMENDED BY CH. 59-201

To: *Silas E. Daniel, Jr., Judge, Justice of the Peace Court, Pinellas County, St. Petersburg*

#### QUESTION:

Do the provisions of Ch. 59-201, F. S., permit a justice of the peace to allow expert witness fees to witnesses who qualify as such and testify in such capacity in a justice of the peace court in preliminary hearings in criminal cases?

Section 90.231, F. S., as amended by Ch. 59-201, provides, in pertinent part, as follows:

(1) The term "expert witness" as used herein shall apply to any witness who offers himself in the trial of any civil action as an expert witness or who is subpoenaed to testify in such capacity before a state attorney in the investigation of a criminal matter, or before a grand jury, and who is permitted by the court to qualify and testify as such, upon any matter pending before any court. (Emphasis supplied.)

This office has heretofore issued two opinions on the general theory of law represented by your inquiry (A. G. O. 054-221, 056-133).

In view of the generally accepted American rule, cited in opinion 056-133, supra, it is my opinion that the 1959 legislative amendment to §90.231, F. S., enlarges said section only to the extent that it provides authority to pay expert witness fees to qualified witnesses subpoenaed to testify in such capacity "... before a state attorney in the investigation of a criminal matter, or before a grand jury ..."

The question, as phrased herein, is therefore answered in the negative, regardless of the manner in which the expert witness is summoned.

059-213—October 20, 1959

#### CRIMINAL PROCEDURE

APPEARANCE BOND—CANCELLATION OF UNDERTAKING—RELEASE OF SURETY— §§903.12(2), 903.20-903.22, 903.31 (AS AMENDED BY CH. 59-192), 920.02(3)

To: *Warren H. Edwards, County Solicitor, Orange County, Orlando*

#### QUESTIONS:

1. Upon conviction, is the surety on an appearance bond released from further liability or may the defendant be continued on the same bond by the court during a presentence investigation?

2. In the event of a mistrial, is the surety on an

**appearance bond released from liability, or is the defendant automatically continued until the next term of court on the same bond?**

For the purpose of this opinion, I shall assume that the appearance bonds about which you inquire are conditioned in accordance with the provisions of §903.12(2), F. S., which requires that when a person is admitted to bail after an indictment has been found or an information filed against him, the condition of the undertaking shall be that he will appear to answer the charge before the court in which he may be prosecuted and submit to the orders and process of the court and not depart without leave. AS TO QUESTION 1:

Question 1 propounded by you recites the fact of a "conviction." If you used that term as referring to a verdict of guilty rendered by a jury, then I think that the answer to the question depends upon whether or not the defendant is taken into custody pending the determination of a motion for new trial. Section 920.02(3), F. S., requires that after a verdict of guilty, the defendant shall remain in custody unless the court, upon good cause shown, permits him to be released upon bail until his motion for new trial is heard and disposed of. If the defendant is *taken into custody* upon the return of a verdict of guilty, it is my opinion that the surety on his bail bond is discharged by operation of law because such taking into custody under authority of law deprives the surety of his right to the control of the defendant (6 Am. Jur. 120, Bail and Recognizance, §142; 8 C. J. S. 150, Bail, §77-b). On the other hand, if, upon the return of a verdict of guilty, the court permits the defendant to go at large on the same bail bond until his motion for new trial is heard and disposed of, I do not think that such action on the part of the court discharges the obligation of the surety to thereafter produce the defendant at such time as the court may order the defendant to appear.

Moreover, when a verdict of guilty is returned, I think that, even though no motion for new trial is pending, the court may properly permit the defendant to go at large on the same bond pending a pre-sentence investigation and that the surety will be obligated to produce the defendant in court at the time his appearance is ordered by the court. This is so because the conditions of a bond executed as provided by §903.12(2) require the defendant to answer the charge and submit to the orders and process of the court, and not depart without leave, and because the surety is obligated to see to it that such conditions are met.

The return of a verdict of guilty does not amount to a "conviction," since a "conviction" requires a judgment of conviction, that is to say, an adjudication of guilt. (*Daughtrey v. State*, 35 So. 397; *Smith v. State*, 78 So. 530; *Weathers v. State*, 56 So. 2d 536).

If a court adjudicated a defendant to be guilty prior to Oct. 1, 1959, but did not immediately sentence him, it is my opinion that the court could properly have permitted the defendant to continue at large on the same bail bond pending a pre-sentence investigation, and that such action would not have released the surety from his obligation on the bond; in other words, that the surety would have been obligated to produce the defendant in court at such later time as the defendant was required by court order to appear.



On Oct. 1, 1959, Ch. 59-192 went into effect. Section 2 of said chapter amended §903.31, F. S., to read as follows:

When the condition of the undertaking is satisfied or the forfeiture of the undertaking has been discharged or remitted the court shall make an order canceling the undertaking. *Conviction or acquittal of the defendant shall satisfy the terms of the undertaking written by any bail bondsman, except where the court shall in the judgment of conviction or acquittal otherwise provide.* (Emphasis supplied.)

I think that the word "conviction," as used in said §2, is to be given the meaning ascribed to it above, that is, an adjudication of guilt. Therefore, it is my opinion that any judgment of conviction, i. e., adjudication of guilt, entered on or after Oct. 1, 1959, must be held to release the surety from his obligation on the bond unless otherwise provided by the court in such judgment of conviction, but that, if the court provides in such judgment of conviction that the defendant's conviction shall not satisfy the terms of the undertaking (bail bond), then the court may permit the defendant to go at large under the bond then in effect, pending a pre-sentence investigation, and the surety will be obligated to produce the defendant when the court order requires the defendant to appear.

Of course, a surety may at any time obtain an order exonerating him from further liability on the bond by surrendering the defendant and following the procedure provided for by §§903.20-903.22, F. S.

#### AS TO QUESTION 2:

A mistrial is neither an acquittal nor a conviction. The law with reference to the effect of a mistrial upon the surety's obligation is stated in 6 Am. Jur. 130, Bail and Recognizance, §166, as follows:

§166. Mistrial.—A mistrial is generally held not to operate to discharge the sureties on a bond of the accused. At least where no order is made placing the defendant in custody or discharging him, and the court is adjourned sine die, the liability of the sureties on his bail bond, with the usual conditions to appear at court and not depart without leave, is not thereby terminated, and on the failure of the defendant to appear at the next term of court, his sureties become liable.

Therefore, it is my opinion that a mistrial does not release the surety from his obligation on the defendant's bail bond, and that when the bond is conditioned in accordance with §903.12(2) the surety is responsible for producing the defendant at such time during the same term or the next term as the court may order the defendant to appear for another trial. The above-mentioned Ch. 59-192 did not affect the law in this regard.

059-214—October 21, 1959

**CORPORATIONS AND BUSINESS TRUSTS**  
**AMENDMENT OF NONPROFIT CORPORATION CHARTER—**  
 §§617.02 AS AMENDED BY CH. 59-427, §§617.012,  
 617.015, 47.34 AND 47.36, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

**QUESTION:**

May a nonprofit corporation created prior to the effective date of Ch. 59-427 which has a charter approved by a circuit judge amend its charter without first reincorporating with the secretary of state under the provisions of §617.012, F. S., as amended by the recently enacted Ch. 59-427?

Section 617.02, F. S., as amended by Ch. 59-427, §7, provides in part:

Any corporation reincorporated hereunder may amend its articles of incorporation as provided in the articles. Any corporation heretofore incorporated hereunder which has not reincorporated under §617.012, F. S., may amend its charter by resolution as provided in the by-laws. In any case, the charter or articles of incorporation shall be amended and the amendment incorporated therein only when the amendment has been filed with the secretary of state, approved by him, and all filing fees have been paid. The secretary of state shall not approve or file any amendment to the charter of a corporation heretofore incorporated hereunder which has not reincorporated pursuant to §617.012, F. S., *unless such corporation has previously filed certified copies of its charter and all amendments thereto with the secretary of state together with an affidavit executed by its president stating that such documents constitute copies of the charter of the corporation and all amendments thereto.* (Emphasis supplied.)

A casual reading of the initial sentences of §7 of Ch. 59-427, quoted above, would suggest that reincorporation is mandatory in order to properly amend a previously existing nonprofit corporation charter. Such a construction would not, however, give any effect to the proviso in italics above. In construing a statute effect must be given to every part if reasonably possible and each part should be construed in connection with every other part so as to produce a harmonious whole (*Snively Groves v. Mayo*, 135 Fla. 300, 184 So. 839; *Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333). In addition, the courts must ascertain and give effect to legislative intent regarding provisos as well as other parts of a statute (*Therrell v. Smith*, 124 Fla. 197, 168 So. 389). This being the case, it would appear from the language quoted above that a nonprofit corporation possessing a charter approved by a circuit judge prior to the effective date of Ch. 59-427 could amend said charter by filing certified copies of said charter with the secretary of state together with all amendments and an affidavit executed by its president stating that such documents constitute copies of the charter of the corporation and all amendments thereto as outlined in §617.02, F. S. Thus while reincorporation with the secretary of state appears desirable to promote uniformity in record keeping it does not appear to be a mandatory prerequisite for

amending the charter of an existing nonprofit corporation possessed of a charter approved by a circuit judge.

The filing fee for such a transaction should be \$10 under the provisions of §617.015, F. S., plus \$1 resident agent's fee authorized under the provisions of §47.34 and 47.36, F. S.

Accordingly, your question as set out above is answered in the affirmative.

059-215—October 22, 1959

#### MOTOR VEHICLES

TRAFFIC VIOLATIONS—SUSPENSION OF DRIVING PRIVILEGE—APPLICABILITY OF POINT SYSTEM AS PROVIDED BY CH. 59-278 TO VIOLATIONS COMMITTED PRIOR TO EFFECTIVE DATE; §322.27, F. S.

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

#### QUESTION:

What is the applicability of Ch. 59-278 (the point system of evaluation of motor vehicle violations) to offenses committed prior to July 1, 1959?

An evaluation of the newly enacted point system (Ch. 59-278) as opposed to the old habitual violator law, in the suspension of a licensee's driving privilege, is necessary in order to place the question in its proper perspective.

Under the old habitual violator law, it was necessary that a licensee accumulate a specific number of traffic convictions within a specific length of time before the department could take action. These types of convictions are briefly outlined as follows:

1. Three moving violations within 12 months.
2. Five traffic violations within 18 months.
3. More than eight traffic violations within 36 months.

Under the above system, once the licensee received a traffic conviction it carried the same efficacy for suspension purposes for a period of three years. Also under the above system, regardless of how serious or how minor the traffic offense might be, each had the same force in bringing about a suspension of the licensee's driving privilege. Example: Five miles above the speed limit carried as much weight as 35 miles above the speed limit.

This law provided two methods of suspending a licensee's driving privilege: one being three moving violations within 12 months for the first suspension, the other being any traffic violations for any subsequent suspension. In view of this, the public at times had difficulty in understanding whether or not certain traffic offenses were considered moving or just plain traffic offenses.

Under the newly enacted "point system" the legislature has provided that a license may be suspended according to the number of points received within a certain length of time, and it further designated the number of points to be assessed for various types of violations.

1. Twelve points within 12 months—suspension of driving privilege for not more than one month.
2. Eighteen points within 18 months—suspension of driving privilege for not more than three months.
3. Twenty-four points within 36 months—suspension of

driving privilege for not more than one year.

Under the point system it is possible for a licensee's privilege to be suspended upon receipt of two traffic convictions since the points are assessed according to the seriousness of the violation. It is also possible for the licensee to accumulate as many as six convictions before being subject to suspension.

The point system also provides that when a conviction becomes 12 months old it be reduced one half in point value. This is intended to be some incentive to the licensee, after receiving a traffic conviction, to attempt to correct his driving habits and reduce the possibility of having his driving privilege suspended.

It is also possible under the point system for the licensee to know at all times how he stands with regard to having his driving privilege suspended.

The legislature considered that the point system would be more desirable and much more lenient than the old habitual violations statute.

We must examine the new statute in toto in order to determine the intention of the legislature as to its applicability. Your attention is respectfully directed to §322.27(2) E. which is as follows:

In computing the total number of points charged to any licensee upon conviction those accrued within the twelve month period *preceding the last conviction* shall be counted at full value. Those accruing from twelve to thirty-six months *preceding the last conviction* said conviction shall be counted at one half their value; *providing, however, that any such conviction which occurred more than thirty-six months preceding the last said conviction shall not be considered.* (Emphasis supplied.)

An examination of this portion of the statute indicates that the legislature intended that *the date of the last conviction* be the determining date in computing points. If the legislature had intended that the act be construed to apply only to violations subsequent to the effective date of the act, it would have been a simple matter to have also precluded the assignment of any points based on any conviction prior to the effective date of the act. There is nothing in the act to indicate that the 36 months do not extend backward of the effective date. On the contrary, it appears to have retroactive operation in not having any provision cutting off points on convictions prior to the effective date of the act and within 36 months.

In order to evaluate the question, it is necessary that we examine the cases from this and other jurisdictions. In the 1957 case of *Smith v. City of Gainesville*, (Fla.) 93 So. 2d 105, the court, in part, said:

There can be no doubt that in the regulation of the use of automobiles on the public highways the State has ample power to require motor vehicle operators to obtain drivers' licenses. It likewise has the correlative power to impose reasonable restrictions on the use and enjoyment of the license. This, in turn, involves the power to make proper provision for the suspension or revocation of a driver's license under appropriate conditions and upon the occurrence of stipulated situations. 5 Am. Jur., Automobiles. Sections 151-157; *Blashfield Cyclopedic of Automobile Laws and Practice*, Chap. 12. We, ourselves, have fully recognized this authority. *Thornhill v. Kirkman*,



Fla. 1953, 62 So. 2d 740. In the case last cited, we aligned ourselves with those authorities which hold that *a driver's license is a privilege, subject to proper regulations*. It does not endow the holder thereof with an absolute property right in the use of the public highway. While in *Carnegie v. Department of Public Safety*, Fla. 1952, 60 So. 2d 728, we held that a driver's license cannot be revoked arbitrarily or capriciously, *we have nonetheless consistently followed the rule, which appears to be unanimous throughout the country, to the effect that upon a proper showing in accord with the prevailing statutes a motor vehicle operator's license may be revoked*. This certainly is as it should be. It would appear to us to be utterly absurd to hold that a man should be allowed to fill his automobile tank with gasoline and his personal tank with alcohol and weave his merry way over the public highways without fear of retribution should disaster ensue, as it so often does. The millions who lawfully use the highways are entitled to protection against the potential tragedy ever lurking, inherent in this type of law breaking. *It is this aspect of protecting the public, rather than as punishment for the offender, that courts have unanimously recognized as justification for revoking drivers' licenses upon conviction of certain offenses*. True the recalcitrant law violator might feel the pain of the loss of a valuable privilege. (Emphasis supplied.)

In the July 1959 term of the supreme court of Florida, in deciding the case of *City of Miami v. Aronovitz*, case 29851, the court cited with favor *Thornhill v. Kirkman*, supra, and as grounds for its holding said:

The toll of traffic deaths proclaims the demanding necessity for the exercise of every lawful requirement to compel careful driving. In Florida during 1958, 1,139 people were killed in traffic fatalities. During the same period there were over 100,000 traffic accidents. In 1959, by the end of July, nearly 600 people had come to their deaths on our highways. There are more than 2,268,000 motor vehicles licensed in Florida and over 428,000 licensed in Dade County alone. Giving recognition to our established judicial viewpoint that an automobile is a dangerous instrumentality, we must conclude that *any procedure lawfully directed toward the effective prevention of the negligent operation of the automobile and the imposition of requirements of competency on the part of the driver thereof, should meet with judicial approbation*. (Emphasis supplied.)

The landmark case in this field is the Virginia case of *Prichard v. Battle*, 17 S. E. 2d 393, in which the court held that the granting of a pardon did not relieve the petitioner therein from the penalty of the revocation of his driver's privilege. This was on the theory, as adopted by the Florida courts, that revocation had neither the purpose nor the effect of punishing the licensee, but had as its purpose the protection of the public. This theory has almost universal following (See Vol. 16a C. J. S. 159; *State v. Parker*, 336 P. 2d 318; *Commonwealth v. Ellett*, 4 S. E. 2d 762; *Commonwealth v. Harris*, 128 S. W. 2d 579; *Doyle v. Kahl*, 46 N. W. 2d 52; *Davison v. State*, 313 S. W. 2d 883; *Parker v. State Highway Dept.*, 78

S. E. 2d 382; Harrell v. Scheidt, 92 S. E. 2d 182, and 35 A. L. R. 2d 1003).

The reasoning of the court in the case of Glenn v. Commissioners of the District of Columbia, (D.C.) 146 A. 2d 575, is particularly appropriate to the case at hand. In that case the court held that the "point system" did not discriminate against the taxi driver who operated a motor vehicle much more proportionately than did an average driver. The admonition of the court was as follows:

The Commissioners are well within the discretion vested in them if they regard *a taxi driver who accumulates twelve points in six months as equally dangerous to the general public as the so-called average driver who collects twelve points in twelve months.* The "Point System" is not a game; it is a serious, intelligent, constructive attempt to promote traffic safety and to correct the deplorable disregard that some drivers display toward traffic regulations. If petitioner wishes to avoid accumulating points more frequently than the average driver, his course is clear; to obey the traffic regulations. (Emphasis supplied.)

In the 1936 California case of *Sleeper v. Woodmansee*, 54 P. 2d 519, the court held that a motorist's liability for negligence was determined by the law at the time of tort and not at the time of the granting of the driver's license. The court reasoned that the motor vehicle operator's license conferred no vested right, being revocable for reasons and in the manner provided by law. This is the first case which would indicate a retroactive application to a motor vehicle operator's license statute. However, we need not depend upon this not so cogent authority in view of the fact that two jurisdictions have squarely faced the question. In the cases of *Thompson v. Thompson*, 78 N. W. 2d 395, and *Durfee v. Ress*, 81 N. W. 2d 148, the court directly held that statutes similar to Ch. 59-278 would have application to traffic violations committed prior to the effective date of the act.

In the *Thompson* case, supra, a 1956 North Dakota case, the licensee had his license revoked on two convictions of driving a motor vehicle under the influence of intoxicating liquors within a period of 18 months, the first having been committed before the point system statute went into effect and the second after the enactment of the law. The court held that this application of the law did not constitute an ex post facto application of the statute and expressed the rule as follows:

All retroactive or retrospective statutes are not unconstitutional. They are of course unconstitutional if they impair the obligation of a contract or violate a constitutional due process clause. A motor vehicle operator's license vests in the licensee neither a contractual nor a property right.

\* \* \*

Turning now to the argument that the revocation of the license in this instance involves an ex post facto application of the statute and is therefore unconstitutional we find that it has no merit for two reasons. The first is that the revocation or suspension of a license operates for the benefit of the public and is not intended as a penalty inflicted upon the license holder.

\* \* \*

The general rule is that where augmented punishments are provided for a second offense the fact that the first offense was committed before the enactment of the statute does not render the application of the statute violative of the ex post facto prohibition.

A statute prescribing a heavier punishment for second offenders is not invalid as ex post facto, even though the first offense was previously committed; the punishment is of the second offense only, but is more severe because of the class in which the defendant placed himself by his first offense. . . .

The same reasoning is applicable to the revocation of a driver's license upon the commission of two offenses where the first commission occurred prior to the enactment of the statute.

Also see 1942 California case of *Ellis v. Dept. of Motor Vehicles*, 125 P. 2d 521.

In *Durfee v. Ress*, supra, a 1957 Nebraska case, the court held that a driver who accumulated nine points for traffic violations while the statute provided that on the accumulation of 12 points operator's license should be revoked until he gave proof of financial responsibility, and the driver accumulated three points after the statute had been amended to provide that on the accumulation of 12 points operator's license should be revoked for one year at the end of which time he must prove financial responsibility, the amended statute was applicable and the driver was not entitled to suspension of revocation immediately upon proof of financial responsibility. The court again cited *Prichard v. Battle*, supra, and held that the revocation of the driver's license was not a penalty but that the plaintiff by his violations of the law had created a record upon which the state in the exercise of its police power has determined that his license shall be revoked. This revocation of the point system is for the purpose of protecting the public. The court then said:

Where an operator's license is revoked under the point system and the statute providing the conditions under which the revocation may be suspended has been amended during the period of the accumulation of the points as a result of which the revocation occurs, the amended act controls. Such an application is not an ex post facto application within the prohibition of the United States and the state Constitutions.

In the 1951 Iowa case of *Doyle v. Kahl*, 46 N. W. 2d 52, the court held that the suspension of a driver's license without a hearing is not depriving him of his property without due process, and said:

. . . his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or *may be later enacted*, if otherwise valid. (Emphasis supplied.)

This reference to subsequent enactment would definitely place this jurisdiction among those that would apply this type of statute retroactively.

From the above statutes and authorities, we must conclude that the right to operate a motor vehicle is a privilege extended by the state and subject to reasonable regulations. The only authority

that the department has for revoking the driver's license is for the purpose of protecting the general public, and not for the purpose of punishing the licensee. A licensee who violates the statute prior to July 1, 1959, is no less dangerous than one who violates the statute subsequent to July 1, 1959. The clear legislative intent is expressed in the statute and is keyed to the date of the licensee's last violation. It will not be presumed that the legislature intended to place all drivers in the same position regardless of their past records.

The duty and authority of the department is to apply the statute to all offenses in the manner prescribed in the statute, regardless of the effective date of the act. It is assumed, however, that the department would not assign points based on prior convictions where the licensee has already drawn suspensions under the earlier act for such convictions.

I trust the foregoing answers your question.

059-216—October 27, 1959

### TAXATION

#### DOCUMENTARY STAMP TAXES—AGREEMENT BETWEEN BANK AND CORPORATION, BANKS AGREEING TO LOAN MONEY UPON ORAL REQUEST OF CORPORATION—§201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Is an agreement in writing between a corporation and a bank, under the terms of which the bank agrees to loan money upon the oral request of the corporation, a "written obligation to pay money" within the provisions of §201.08, F. S., imposing a documentary stamp tax upon such instruments?

An examination of the agreement, referred to as a "continuing loan agreement," indicates that under the terms of said agreement the bank agrees to loan money upon the oral request of the lendee-corporation. It is agreed by the parties to said agreement that the lendee will not be required to execute or deliver to the lender any note or any other written evidence of any loan of money made pursuant to the terms of said agreement. The lendee agrees to repay all amounts received pursuant to such oral requests. In substance, the agreement is nothing more than a naked contract between the bank and the corporation in which the bank contracts to make advances, loans of money upon the oral request of the corporation without any security being given for said loans by the corporation.

Section 201.08, F. S., provides that "on promissory notes, non-negotiable notes, written obligations to pay money, assignment of salaries, wages or other compensation, made, executed, delivered, sold, transferred, or assigned in the state, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, the (documentary stamp) tax shall be ten cents." The supreme court of Florida, in *Metropolis Publishing Co. v. Lee*, 126 Fla. 107, 170 So. 442, held that the stamp tax imposed by §201.08, supra, could not be sustained unless the transaction was clearly within the terms of said section and that statutes imposing documentary stamp taxes should



be strictly construed in favor of the taxpayer and against the taxing authority.

The U. S. circuit court of appeal for the 5th circuit, (*Lee v. Keenan*, 78 F. 2d 425) in construing §201.08, *supra*, held that a "written obligation to pay money" referred to a direct written promise to pay a stated sum of money, and did not encompass an obligation to pay an amount that may be established only by proof of extrinsic facts.

The agreement before us is nothing more than an executory contract to make a loan to the corporation upon its oral request; no debt or other obligation to pay money in an amount certain exists under the terms of said agreement. It is quite possible that under the agreement no loan would ever be made because the corporation may not request same.

These above observations and authorities lead us to the conclusion that an agreement or contract by a bank to lend an unspecified sum of money upon the oral request of a corporation, without any written evidence of said prospective loans, is without the purview of and not subject to the tax provided for in §201.08, F. S.

Your question is accordingly answered in the negative and your file returned herewith.

059-217—October 27, 1959

#### PUBLIC LANDS

REQUIREMENT FOR ESTABLISHMENT OF BULKHEAD LINE AS PREREQUISITE TO SALE OF SOVEREIGNTY OFFSHORE AREAS—§§253.12, 253.122-253.124, F. S.

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

#### QUESTION:

Is it necessary as a prerequisite to the purchase by private parties of unsurveyed offshore islands from the trustees of the internal improvement fund under §253.12, F. S., that such purchaser first procure the establishment of a bulkhead about such island or islands in accordance with the provisions of §253.122, F. S.?

The power to fix bulkheads is set forth in §253.122, F. S., reading in part as follows:

*253.122 Power to fix bulkheads.—*

(1) Subject to the formal approval of the trustees of the internal improvement fund, the board of county commissioners of each county or governing body of any municipality, . . . are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable waters of the county, as defined in §253.12, . . . (Emphasis supplied.)

The language clearly indicates the authority to fix bulkhead lines around offshore flats or islands bordering on or being located in the navigable waters of the state.

The purpose of the bulkhead provisions of Ch. 253, F. S., is to set an exterior boundary beyond which no sales will be made and no fill operations permitted. This not only assures protection of the people's trust in navigable waters but also prevents uneven

and unattractive shore lines, as well as pockets creating a health menace.

According to the provisions of §253.12, F. S., the title to all sovereignty tidal and submerged bottom land, including all islands located in navigable waters, which shall include all coastal and intracoastal waters of the state, is vested in the trustees of the internal improvement fund. Said section also provides that:

... The trustees of the internal improvement fund may sell and convey such island and submerged lands if not determined by the trustees to be contrary to the public interest upon such prices, terms and conditions as they see fit. . . . (Emphasis supplied.)

The language of §253.122, F. S., when read in context with §253.12, *supra*, indicates that the trustees may require the establishment of bulkhead lines as a prerequisite to a sale of sovereignty offshore areas, including all islands.

It should be noted that the establishment of bulkhead lines is separate and distinct from the provisions of Ch. 253, *supra*, concerning fill permits. In other words, the fact that no extension into open water is contemplated in connection with the purchase of the particular island in question would not lessen the necessity for the fixing of bulkhead lines. In this regard I call your attention to certain statements in an earlier opinion (A. G. O. 058-103, March 21, 1958), which provides in part:

The provisions of Ch. 57-362, concerning fill permits, are entirely separate and distinct from the provisions governing establishment of bulkhead lines . . . Section 253.123, F. S., requires that a bulkhead line must first be established before a fill permit will be issued, and Section 253.124, F. S., requires an application for a fill permit to the local authority which must be approved by the trustees of the internal improvement fund. *It is thus the intent of the act to require two applications and the fact that a bulkhead line has been established does not necessarily guarantee the upland owner that he will be granted a permit to fill out to the bulkhead line.* To the contrary, the act provides that "any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of lands or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed." The line thus fixed is the outer limit but this does not require the local authority or the trustees to permit fill operations to such line. The fill permit which must be submitted under this act to the local authority must be approved by the trustees before becoming final the same as the bulkhead line fixed by the local authority. . . . (Emphasis supplied.)

In light of the above statements, the establishment of a bulkhead may be made a prerequisite to the purchase of certain offshore islands from the trustees of the internal improvement fund. Your question is therefore answered in the affirmative.

059-218—October 27, 1959

**PUBLIC UTILITIES**  
**THE WATER AND SEWER SYSTEM REGULATORY ACT—CH.**  
**59-372—EFFECTIVE DATE**

To: *Bolling C. Stanley, Executive Secretary, Florida Railroad and Public Utilities Commission, Tallahassee*

**QUESTION:**

**What is the effective date of Ch. 59-372?**

Section 23, Ch. 59-372, provides:

The provisions of this act shall become effective in a county of this state immediately upon the adoption by the board of county commissioners of such county of a resolution declaring that such county is subject to the provisions of this act and the submission of said resolution to the railroad and public utilities commission. (Emphasis supplied.)

Section 25 provides that the above referred to act shall become effective immediately upon becoming law. The act became law on June 18, 1959.

The apparent incongruity existing between §23 and §25 may be resolved by drawing a distinction between "the provisions of this act" in §23 and the reference to the act as a whole in §25. Section 23 authorizes the counties to adopt provisions of the act, while §25 makes the entire act effective as law.

The many apparent problems and conflicts which would result from interpreting §25 so as to make it applicable to all of the counties of the state leads me to the conclusion that the legislature intended that the over-all provisions of the act should be made applicable to the state as a whole as a general law. With such authority the individual counties, within their discretion, could adopt a resolution declaring that the county was subject to the act. An illustrative example is found in §3 of the act which provides for a 60-day time limit from the effective date of the act for registration and notice of every public hearing required by the act. It would be unreasonable to assume that the utility in this instance should register within the period provided since it would have no interest in the hearing held under the act unless the county had adopted or had become subject to the general law. Also, since 60 days have elapsed since June 18, 1959, when the act became law, if it was contemplated that such date was the effective date of the act for all counties, utilities in counties which had not yet come under the law would be precluded from receiving such notice of hearing should the counties later file a resolution.

Another example is found in §6(a) of the act which poses the problem that if the 120 days allowed for the filing of an application for a certificate began running on June 18, 1959, there devolves upon the commission the duty of entertaining applications filed by utilities located in counties that may never come under the law. It therefore appears more logical that the effective date of the "provisions of the act" be the date on which the county commission files a resolution under §23. Otherwise the duty would exist to issue certificates to utilities which may never become effective for regulatory purposes. It would also necessitate the payment of a gross receipts tax for the holders of these cer-

tificates as is provided in §19 of the act.

In addition, under §12 unless the effective date of the act is the date when the resolution is filed by the county commissioners, it would appear that the rates in effect on June 18, 1959, of water and sewer companies in counties that have not yet filed resolutions are frozen for an indefinite time. Since that section of the act provides that they can be thereafter changed only by the commission, the commission would then have no jurisdiction over them unless and until their county files a resolution.

Legislation may be made effective upon the occurrence of a contingency, such as an affirmative vote at an election (*Winter Haven v. State*, 125 Fla. 392, 170 So. 100; *Voorhees v. Miami*, 145 Fla. 402, 199 So. 313; *Gillette v. Tampa, Fla.*, 57 So. 2d 27). "A law of this kind . . . is in the nature of a floating enactment until it is made applicable to a particular locality in the mode prescribed" (50 Am. Jur. 28, §11). The two effective date provisions in chapter 59-372, above mentioned, may be reconciled by holding that §25 put the enactment into effect as a floating enactment to become effective in those counties adopting it in accordance with §23 thereof.

In view of the foregoing, it is my opinion that the legislature intended that the effective date of the act becoming law would be the date that the act was signed by the governor. Such early effective date was needed to allow certain counties to adopt the provisions of the act to meet urgent needs without making it mandatory that all of the counties of the state immediately adopt same.

Therefore, it is my opinion that the act as a whole permitting counties to adopt the provisions thereof became effective on June 18, 1959, but the effective date of the provisions of the act as they apply to specific counties would be upon the adoption by the board of county commissioners of each county of a resolution pursuant to §23.

059-219—October 28, 1959

#### PUBLIC BUSINESS

#### PRINTING OF EXAMINATION GIVEN BY FLORIDA STATE BOARD OF MEDICAL EXAMINERS—NECESSITY FOR BIDS—CHS. 283-287, F. S.

To: *Homer L. Pearson, Secretary-Treasurer, State Board of Medical Examiners, Miami*

#### STATEMENT OF FACT:

In the past each member of the board of medical examiners has had his examination paper printed in the town in which he lives. In many instances the examination consists of several pages and the cost of printing exceeds \$50. For obvious reasons the board has not considered it advisable to submit copies of all the examination questions to printers for bids. It is the board's desire to continue handling the matters as it has in the past. However, if it is not legal to do so, all examination papers will have to be submitted by each board member to the secretary's office to be mimeographed, which will require the hiring of a temporary employee to handle the additional work and in the long run will probably cost more.



## QUESTION:

Is it necessary to obtain bids on the printing of the examinations given by the Florida state board of medical examiners?

Attached hereto is a copy of the *laws, rules and regulations* governing class B printing as adopted by the legislature of the state purchasing commission.

Your attention is called to §4(9), p. 13, of said rules and regulations, which provides as follows:

All contract awards by State agencies for Class B printing in excess of \$50.00 shall be let only after receipt of two or more competitive bids for each job under consideration.

Section (4), p. 10, provides for bid information on all purchases in excess of \$50 to be submitted to the state purchasing commission.

In view of the provisions of Chs. 283-287, F. S., together with the rules and regulations adopted pursuant thereto by the state purchasing commission, it is my belief that all purchases of printing by the state board of medical examiners that exceed \$50 will have to be made by means of competitive bids.

I trust the foregoing is the information you requested.

059-220—October 28, 1959

## ELECTORS AND ELECTIONS

RETAIL SALE OF INTOXICATING BEVERAGES WHILE  
POLLS ARE OPEN—SPECIAL ELECTION, NOVEMBER  
3, 1959—§104.381, F. S.; §3, ART. XVII, STATE CONST.

To: L. Grant Peebles, Director, State Beverage Department, Tallahassee

## QUESTION:

Are the provisions of §104.381, F. S., as amended by Ch. 28194, 1953, relating to closing of bar rooms, saloons, cocktail lounges, etc., for the period of time and within an area where described elections are held, applicable to the election to be on the first Tuesday after the first Monday in November, 1959, as provided by Ch. 59-132, under the authority of Art. XVII, State Const.?

Section 104.381, F. S., prohibits intoxicating beverages from being sold at retail during any state, county or municipal general or primary election and provides that vendors' places of business shall be closed during the hours the polls are open. This section also gives the board of county commissioners or the city governing body authority to extend the closing hours beyond the times the polls are open, if necessary, but not to exceed the time starting at 12:00 midnight of the evening preceding the election until 7:00 A. M. of the day after the election.

Prior to 1953, when §104.381, F. S., was amended, the statute included "special" elections. However, by the 1953 amendment the "special" elections were eliminated from the provisions of §104.381, *supra*.

There is no question but that the election to be held on Nov. 3, 1959 is a "special" election. It is so named in Ch. 59-132 (Senate bill 659), which is the act providing for the election to vote

on the constitutional amendment and this act was passed by the legislature under the authority of Art. XVII, State Const., which relates to the methods of amending the constitution.

Section 3 of Art. XVII, State Const., provides for submitting emergency amendments to the constitution for the people to either ratify or reject by their vote. This section of Art. XVII of the constitution provides for a "special" election to be held not less than 90 days nor more than 180 days after adjournment at which special election the proposed amendment is submitted to the electors for approval or rejection.

Under both the terms of the act providing for the constitutional amendment and under Art. XVII, relating to means of amending the constitution, the election of Nov. 3, 1959, is classified as a "special" election and, therefore, the provisions of §104-381, F. S., would not apply.

059-221—October 29, 1959

#### CORRECTIONAL SYSTEM

COUNTY CONVICTS—GRANT OF ADDITIONAL GAIN TIME  
§§951.21, 944.29 AND 944.02, F. S.

To: *H. Vivian Saxon, County Commissioner, Pompano Beach*

#### QUESTION:

**Does the board of county commissioners have the power or authority, by resolution, under §951.21, F. S., or any other statute, to grant additional gain time for extraordinary, exemplary or outstanding conduct by county convicts and prisoners?**

In A. G. O. 057-274, I concluded that county prisoners were still entitled to the benefit of gain time, notwithstanding the language used in §43, Ch. 57-121, which purported to repeal Ch. 954, 1955.

It is therefore my opinion that the jurisdiction for gain time consideration for county convicts remains exclusively in the board of county commissioners.

Section 944.29, F. S., provides:

The board upon recommendation of the director may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry.

In §944.02, F. S., is found the definition of the terms: "board," "department," "prisoner," and other pertinent terms. It does not appear that any of these terms are applicable to a county convict.

Our supreme court held in *Dear v. Mayo*, 14 So. 2d 267, that parole and gain time are granted by the sovereign as a matter of grace, and the state may offer such grace under such conditions as it may consider most conducive to accomplish the desired purpose.

There can be no doubt that your desired purpose in granting extra good time allowance for meritorious conduct or exceptional industry is properly founded and most worthwhile. However, I am unable to conclude that the provisions of §944.29, *supra*, relate to county convicts, and therefore any gain time awarded such prisoners would be restricted to that authorized by §951.21, F. S.

Your question as phrased above, is therefore answered in the negative.

059-222—November 6, 1959

# WEAPONS AND FIREARMS

CARRYING FIREARMS IN NATIONAL FORESTS—§§372.07, 790.01, 790.05, 790.11-790.14, F. S. AND §30, ART. IV, STATE CONST.

To: A. D. Aldrich, Director, Florida Game and Fresh Water Fish Commission, Tallahassee

## QUESTION:

Was §790.11, F. S., repealed or otherwise affected by the adoption of §30, Art. IV, State Const.?

Although §30, Art. IV, State Const., vests in the game and fresh water fish commission the "management, restoration, conservation and regulation, of the birds, game, fur-bearing animals, and fresh water fish of the state," including the power and authority "to fix bag limits and to fix open and closed seasons . . . and to regulate the manner and method of taking, transporting, storing and using birds, game, fur-bearing animals, fresh water fish, reptiles and amphibians," the said constitutional amendment provides that "the legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment (§30, Art. IV, State Const.), and all existing laws inconsistent herewith shall no longer remain in force and effect." Under the above mentioned constitutional amendment the legislature "*may enact any laws in aid of*, but not inconsistent with, the provisions" of said §30, Art. IV, State Const., and only *inconsistent laws were repealed* by the amendment. The question centers around the question of whether §790.11, F. S., is inconsistent with §30, Art. IV, State Const., or may it be said to be in aid thereof. The legislature is authorized to enact laws in aid of the amendment so long as they are not inconsistent therewith.

This raises the question of whether §§790.11-790.14, F. S., may be said to be in aid of the amendment and regulations adopted pursuant thereto and not inconsistent thereto. Does the said statute relate to "the management, restoration, conservation and regulation of the birds, game, fur-bearing animals and fresh water fish, of the state" or "the manner and method of taking, transporting, storing or using birds, game, fur-bearing animals, fresh water fish, reptiles and amphibians," or is it only in aid of the same? If said sections are not regulations but merely in aid of the enforcement of said §30, Art. IV, State Const., then it would seem to be within the portion of said §30(7) providing that "the legislature may enact any laws in aid of, but not inconsistent with, the provisions of" said §30, Art. IV, State Const.

Sections 790.11-790.14, F. S., prohibit the taking of guns "within the limits of a national forest area within the state," (except during open hunting seasons permitting hunting on such areas, and then only when such person is in possession of a valid hunting license), unless and until such person shall have obtained a permit for the carrying of such gun from the proper board of county commissioners in the manner provided in and by said sections of the Florida Statutes. The prohibition is not necessar-

ily a regulation for the management, restoration, conservation and regulation of birds, game, fur-bearing animals or fresh water fish, within the constitutional amendment; at most it is merely an aid in such management, restoration, conservation and regulation of birds, game, etc. Where there is doubt as to the meaning and purpose of an act, or a statute derived from such act, the title to the act may be resorted to and considered when construing such act or statute (*Curry v. Lehman*, 55 Fla. 847, 47 So. 18; *State v. Yeats*, 74 Fla. 509, 77 So. 262; *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771; *Foley v. State*, Fla., 50 So. 2d 179; *Panama City Airport Board v. Laird*, Fla., 90 So. 2d 616). Turning to Ch. 17911, from which §§790.11-790.14, F. S., were derived, we find from its title that it was "an act to regulate the carrying of firearms out of hunting season within the territorial limits of national forest areas in the State of Florida, and providing penalties for violation of the same." At most this relates only remotely and indirectly to the "management, restoration, conservation and regulation of birds, game, etc." by the regulation of carrying firearms on the areas. As a matter of fact no mention is made in the said title of the act to management, restoration, conservation and regulation of birds, game, etc., from aught appearing the purpose of the act may be otherwise.

Statutes such as those found in §§790.01, et seq., other than said §§790.11-790.14, regulating the carrying and use of firearms doubtless were not intended as regulations relating to the management, restoration, conservation, and regulation of birds, game, etc. The legislature may have had other reasons in mind, when it enacted what are now §§790.11-790.14, F. S., than the management, restoration, conservation and regulation of birds, game, etc. Section 790.05, F. S., is similar in purport to said §§790.11-790.14, in that it regulates the carrying of pistols, Winchester rifles or other repeating rifles. Section 372.07, F. S., granted police powers to officers enforcing laws and regulations regulating the taking of game, fish, etc., which statute was first enacted in 1929, and was subsequently amended in 1935 and 1945. This section was involved in *Bronson v. State*, Fla., 83 So. 2d 849, text 850, where Bronson was charged with a violation of said section, that is, resisting an officer, to wit, an agent of the game and fresh water fish commission, in defense of which he contended that the section had been repealed by the constitutional amendment. The statute was upheld, the court remarking that "the statute was, in our opinion, consistent with the amendment and an aid to the commission and its agents in the performance of the duties imposed upon them." Sections 790.11-790.14, F. S., may well be of the same type statute.

We, therefore, hold that §§790.11-790.14, F. S., were not repealed by the adoption of §30, Art. IV, State Const., and remain in force and effect for the purposes for which intended; however, if the game and fresh water fish commission needs more stringent regulations in this connection it may adopt such regulations as to management, restoration, conservation and regulation of birds, etc., only, leaving said sections in force as to other purposes that may be covered thereby.



059-223—November 6, 1959

**STATE INSTITUTIONS**  
**BLOOD DONORS—LEGAL AGE—LIABILITY OF PHYSICIAN**  
**IN CHARGE OF FLORIDA TEACHING HOSPITAL BLOOD**  
**BANK FOR PERSONAL INJURY ACCIDENTS**

To: *Harry M. Philpott, Vice President, University of Florida,  
Gainesville*

**QUESTIONS:**

1. What are the legal ages for prospective blood donors in the following categories:

- (a) Unmarried males and females
- (b) Married males and females
- (c) Male and female persons in the Florida state prison system?

2. Would the physician in charge of the university of Florida teaching hospital blood bank be liable in a personal injury accident in either of the following situations:

- (a) In the event a patient receives a transfusion of the wrong blood type due to an error by one of the technologists; and
- (b) In the event of a blood donor faints, falls and is injured as a result in the vicinity of the blood bank?

**AS TO QUESTION 1:**

In the absence of specific legislative enactment, the state board of health has promulgated certain regulations in regard to blood donations as follows:

(a) Any unmarried male or female between the ages of 21 and 59 and in good physical health may donate blood.

(b) Any married male or female or any member or former member of the armed forces, including ROTC, or any unmarried male or female with parental consent between the ages of 18 and 21 may donate blood.

(c) Any person in the Florida state prison system conforming to the above age requirements.

**AS TO QUESTION 2:**

The liability of the medical director of the university of Florida teaching hospital blood bank from accidents arising in the performance of his duties appears to be covered in A. G. O. 054-18, dated Jan. 28, 1954, and 058-99, dated March 19, 1958, copies of which are enclosed. Subsequent to these opinions the 1959 legislature provided authority for the board of control to buy liability insurance to protect the institutions under its direction. This would include the medical school and teaching hospital.

Of course the medical director's personal liability for malpractice for incidents arising from his negligence would be unaffected by anything contained herein. If injury was incurred in either of the two situations contemplated in your question because of negligence on the part of the medical director personally, he could be subject to suit and would not be protected by the liability insurance coverage of the university itself.

059-224—November 6, 1959

### MOTOR VEHICLES

DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR—APPLICABILITY OF §317.20(2), F. S., AS AMENDED BY CH. 59-94, TO CONVICTIONS WHICH OCCURRED PRIOR TO EFFECTIVE DATE OF ACT

To: William D. Lines, Prosecuting Attorney, Gadsden County, Quincy

#### QUESTION:

**Do the provisions of §317.20(2), F. S., as amended by Ch. 59-94, 1959 Legislature, effective date July 1, 1959, apply to convictions which occurred prior to the effective date of said section?**

In order to answer your question it is necessary to examine the effect of the amendment on the statute.

Under the old statute, first offenses were punishable by imprisonment for not more than six months, or by a fine of not less than \$25 nor more than \$500, or by both such fine and imprisonment. Second or subsequent convictions were punishable by imprisonment for not less than 10 days nor more than six months and, in the discretion of the court, a fine of not more than \$500.

Under the amended statute, the penalty is the same for first offense, and the same for second offense except that the second offense must have occurred within three years of the date of the first offense. The statute then provided a penalty for third and subsequent offenses within a period of five years from the date of the first conviction of imprisonment of not less than 30 days and not more than 12 months and, in the discretion of the court, a fine not to exceed \$500.

An examination of the amendment to the statute thus reveals that the penalty has been increased in part and reduced in part. Although this office has recently held, in A. G. O. 059-215, that the "point system" (Ch. 59-278) for evaluating motor vehicle violations may be applied retroactively, this opinion was based on the fact that this was not punishment to the driver but an exercise of police power by the state for the purpose of protecting the public. That question is not here present, as the statute before us is punishment of the offense.

In the 1928 Florida case of *Cross v. State*, 119 So. 380, the court, in declaring that an habitual offender act would be invoked where one of the offenses was committed subsequent to the effective date of the act and the other offenses were committed prior to the effective date of the act, stated the general law to be as follows:

All questions here raised by the defendant against the constitutional validity of chapter 12022, supra, have been settled adversely to his contentions, in so far as the Federal Constitution is concerned, by *Graham v. West Virginia*, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917; *McDonald v. Massachusetts*, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 543; and *Moore v. Missouri*, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301, and as to state Constitutions by the decisions of numerous state courts. The reasoning supporting these decisions is equally applicable to like provisions found in the Constitution of Florida. See the

very complete note to *State v. Le Pitre*, 18 Ann. Cas. 924; and *In re Miller*, 34 L. R. A. 394, 64 Am. St. Rep. 378; note to *Comm. v. McDermott*; 224 Pa. 363, 73 A. 427, 24 L. R. A. (N. S.) 431; *Bishop, Crim. Law* (9th Ed.) §§947(7), 993a; *Jones v. State*, 9 Okl. Cr. 646, 133 P. 249, 48 L. R. A. (N. S.) 204; 8 R. C. L. 271; 16 C. J. 1339.

(6) Chapter 12022, *supra*, does not violate constitutional provisions prohibiting the passage of ex post facto laws. The statute is in no sense retroactive. It is prospective in its operation. It imposes enhanced punishment for none but future crimes committed after its enactment. It deals with offenders only for offenses committed after its passage, but provides that in fixing the punishment for the later offense, the condition into which the offender has brought himself by his previous conduct shall be taken into consideration. In punishing offenders for a criminal habit, the existence of which cannot be established without showing their former convictions as well as the conviction for which the enhanced punishment is imposed, the increased severity of the punishment for the second or subsequent offense is not a punishment of the person a second time for his former offenses but is a more severe punishment for the last offense, the commission of which is a manifestation of a criminal habit may be taken into account in determining the adequacy of punishment to be imposed upon habitual offenders for offenses committed subsequent to the enactment of the statute. But for the commission of the subsequent offense, the enhanced penalty would not be imposed. *Comm. v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18. The statute is not rendered ex post facto by providing enhanced punishments for a subsequent offense because of convictions occurring prior to the passage of the statute. *Ex parte Allen*, 91 Ohio St. 315, 110 N. E. 535. In 1 *Bishop's Crim. Law*, § 283 (9th Ed.) that author says: "A statute which provides a heavier punishment for a second offense than for the first, is not ex post facto, even though the first took place before its passage. It has been repeatedly adjudged "that the previous commission of crimes may be considered in determining the punishment to be imposed, and in the creation of certain kinds of statutory offenses, without rendering a statute an ex post facto law." When both offenses however were committed before, the consequence is otherwise." The point is ably summarized by the Supreme Court of Virginia in *Rand v. Com.*, 9 Grat. (50Va.) 738, wherein that court said: "The constitution withholds from the legislature the power to convert, by statute, into a crime, an act which, at the time it was done, offended against no law; or to visit a criminal act even with penalties more severe than those which were attached to it by the law when it was committed. No constitutional or other obstacle, however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act may, if shown to have committed like offenses before, be sub-

jected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity.

Statutes of this nature are not modern innovations but their primary elements have been embodied in statutes in other states as early as 1796. In Florida, enhanced penalties for second offenses of larceny have long existed (see §§5132, 5134, 5137, and 5140, R. G. S. 1920) as well as laws prohibiting sales of intoxicating liquors (see §5486, R. G. S., 1920). Many able courts have considered statutes of this nature and have uniformly sustained their validity.

The rule is well stated in the 1956 North Dakota case of *Thompson v. Thompson*, 78 N.W. 2d 395, text 400, in which the court stated:

The general rule is that where augmented punishments are provided for a second offense the fact that the first offense was committed before the enactment of the statute does not render the application of the statute violative of the ex post facto prohibition.

A statute prescribing a heavier punishment for second offenders is not invalid as ex post facto, even though the first offense was previously committed; the punishment is of the second offense only, but is more severe because of the class in which the defendant placed himself by his first offense. . . .

The same reasoning is applicable to the revocation of a driver's license upon the commission of two offenses where the first commission occurred prior to the enactment of the statute.

In view of the fact that the punishment for first offenses is exactly the same under the amended statute, there is no question of retroactive application. Under the reasoning of the court above quoted, it would appear that the amended statute would apply to second, third and subsequent offenses even though one or more of the offenses were committed prior to the effective date of the act, so long as at least one of the convictions is subsequent to the effective date of the act. This would apply regardless of whether the amended act had the effect of increasing or decreasing punishment, as the punishment is for the offense for which he is presently convicted. A more severe punishment is as a result of the class in which the defendant places himself by reason of his prior offense.

Your question is therefore answered in the affirmative, so long as at least one of the convictions is subsequent to the effective date of the act.

059-225—November 6, 1959

#### TAXATION

#### OCCUPATIONAL LICENSE TAX—FOREIGN CORPORATIONS TRANSPORTING NATURAL GAS INTO THIS STATE— CH. 205, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Where a foreign corporation engaged in the business of transporting natural gas into this state from or through one or more other states by a continuous and



steady flow through "trunk" or pipe lines, for the purpose of selling the gas at wholesale to local distributors, without any change in the pressure or processing of the gas until such sale, is such business activity subject to the licensing provisions of Ch. 205, F. S.?

Under the commerce clause of the U. S. Const. (Clause 3, §8, Art. I) the regulation of interstate commerce is expressly granted to the federal government and said clause impliedly withholds such regulation by the individual states. Furthermore, "apart from a requirement of a license under the police power, and the qualification of the commerce clause by the Twenty-First Amendment, the general rule is that a state cannot make the payment of a license tax or the securing of a license a condition to carrying on interstate commerce and cannot tax the privilege of carrying on interstate business." (33 Am. Jur. 345, §25). "Neither can a state or subdivision thereof tax the business engaged in interstate commerce, by imposing a license tax on its agents or salesmen." (33 Am. Jur. 346, §25).

It seems well settled that the transportation of oil or natural gas from one state into another by way of pipe lines is interstate commerce and that persons engaged in such business activity are engaged in interstate commerce. (U. S. v. Ohio Oil Co., 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459; Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227; Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117; Missouri ex rel Barrett v. Kan. Natural Gas Co., 265 U. S. 298, 44 S. Ct. 554, 68 L. Ed. 1027; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 51 S. Ct. 499, 75 L. Ed. 1171). An examination of your file presented with request for opinion reveals that a foreign corporation, which may or may not be authorized to do business in this state, operates and maintains in this state a pipe line, sometimes called a "trunk" line, carrying natural gas and possibly other similar products. The "head" of said line begins outside this state and passes through one or more states prior to reaching Florida. This corporation sells the natural gas piped into this state at wholesale to various local distributors herein who in turn retail the gas to customers.

It has been said that the *test* to be used in determining where the interstate character of natural gas, brought into a state via pipe lines, ends, and the intrastate character begins (thus subjecting the business to state license taxation) is whether the pressure in the pipe lines has been reduced to allow it to enter the service pipes of distributors (retailers), or the gas processed or otherwise changed in the state attempting to levy the tax. (Ill. Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U. S. 498, 62 S. Ct. 384, 86 L. Ed. 371, text 375; Colo.-Wyo. Gas Co. v. Fed. Power Comm., 324 U. S. 626, 65 S. Ct. 850, 89 L. Ed. 1235). Thus, the primary question in determining when the transportation of natural gas is intrastate is: At what point in the state does the natural gas *come to rest*, to be sold in that state? When this point is reached there seems little question but that the gas, and persons engaged in the business of transporting and distributing same, are subject to state regulation, both as to taxation and to licensing. (So. Nat. Gas Corp. v. Ala., 301 U. S. 148, 57 S. Ct. 696, 81 L. Ed. 970; Colo.-Wyo. Gas Co. v. Fed. Power Comm., 324 U. S. 626, 65 S. Ct. 850, 89 L. Ed. 1235).

Accordingly, it has been held that a state license tax imposed on a foreign corporation selling at wholesale to distributors natural gas coming into the taxing state from another state is invalid as a burden on interstate commerce. (*State Tax Comm. v. Interstate Nat. Gas Co.*, 284 U. S. 41, 52 S. Ct. 62, 76 L. Ed. 156). This is true even though title to the gas changes as it passes through a meter at the boundary line of the taxing state (*People's Nat. Gas Co. v. Pub. Serv. Comm. of Penn.*, 270 U. S. 550, 46 S. Ct. 371, 70 L. Ed. 726), and even though the gas is transported by producing companies' lines to the state line, thence by means of the local company's high pressure lines to a connection with local systems (*E. Ohio Gas Co. v. Tax Comm. of Ohio*, 283 U. S. 465, 51 S. Ct. 499, 75 L. Ed. 1171). However, "the business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." (*Missouri ex rel Barrett v. Kan. Nat. Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. Ed. 1027, text 1030). Thus, it has been said that a corporation engaged in the transmission and sale of natural gas purchased from producers outside the state, where such sales are made at retail to consumers, is subject to state taxation even though the corporation may incidentally be engaged in interstate commerce in transporting the gas into the state for sale at retail. (*So. Nat. Gas Corp. v. Ala.*, 301 U. S. 148, 57 S. Ct. 696, 81 L. Ed. 970). Where, however, the corporation is engaged solely in selling at wholesale natural gas brought into the taxing state for distribution to local distribution companies, state occupational taxation thereof has been declared invalid as a burden on interstate commerce. (*State Tax Comm. v. Interstate Nat. Gas Co.*, 284 U. S. 41, 52 S. Ct. 62, 76 L. Ed. 156).

The conclusions which may be drawn from the foregoing authorities in regard to taxation or licensing of natural gas by a state into which the gas is brought from another state, leads to the observation that natural gas sold and delivered by the importing company at wholesale to a local distributing company, or through the agency of a local distributing company, in a continuous uninterrupted flow, and without any change in the pressure or other processing, is not subject to the taxing power of the state. But natural gas which, before delivery to such distributing company or consumer, is subjected to processing, such as a reduction of the original pressure, is subject to the taxing power of the state. Furthermore, imported natural gas via pipe line which has been delivered to the mains of a local distribution company who, in turn, distributes the gas to local consumers through its own lines, under reduced pressure, is considered as being intrastate commerce and therefore subject to the taxing power of the state. (See also *Penn. Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434; *Sioux City v. Missouri Valley Pipe Line Co.*, D. C., Iowa, 46 F. 2d 819).

In *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So. 2d 600, a corporation purchased and transported natural gas from without this state through its distribution system into this state for sale to local distributors at wholesale. There was no reduction of pres-

sure on the pipe lines up to the point of delivery at the measuring stations, where the gas was metered and where the pressure was then reduced for the first time since entering this state. The court (p. 602) affirmed the lower court's ruling that "the sale and transportation through appellee's (corporation's) pipe lines of the natural gas and the delivery thereof in Escambia County, Florida, to its four customers was interstate commerce" (p. 601) and therefore immune from the gross receipts tax sought to be imposed under Ch. 203, F. S.

It is well settled in this state that persons, corporations and other entities engaged solely in interstate commerce are immune from state, county and municipal license taxation. (*Cason v. Quinby*, 60 Fla. 35, 53 So. 741; *Ferguson v. McDonald*, 66 Fla. 494, 63 So. 915). However, it is equally well established that the mere fact that a corporation engages primarily in business or commerce of an interstate character does not relieve it of such license taxation if it also engages in intrastate or local business. (*Osborne v. State*, 33 Fla. 162, 14 So. 588, affirmed 164 U. S. 650, 17 S. Ct. 214, 41 L. Ed. 586).

Accordingly, if the corporation in question is engaged solely in interstate commerce in that the natural gas transported into this state through its main pipe lines in a continuous and uninterrupted stream from points without this state, without any reduction in pressure on the pipe lines up to the delivery point where it pumps the gas into the lines or other vehicles of transportation of the local distributors, for retail sale to the ultimate consumer by the local distributors, such business activity would be immune from state or local license taxation in this state. However, if such corporation engages in retail sales to consumers in this state in that it distributes its gas into the pipe lines of the consumers by reducing the pressure on the pipe lines, or in any other way processes the natural gas, then this activity would appear to be of an intrastate or local character such as would subject this activity to state and local license taxation.

Your question is answered in the negative.

059-226—November 6, 1959

#### TAXATION

#### TAXES ON GASOLINE AND LIKE PRODUCTS—APPLICATION FOR REFUND PURSUANT TO §208.183, F. S.—§§208.01, 208.02, 208.04, 208.181, ET SEQ. F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Is a person licensed as a retail dealer under §208.01, F. S., entitled to file an application for refund of state gasoline taxes under §208.183, F. S., beyond "six months of date of purchase of gasoline with respect to which refund is claimed," although said application is filed within six months of the end of the quarter in which said gasoline is purchased?

Section 208.181, F. S., provides in part that "every person, firm or corporation licensed to sell gasoline at retail to the general public at posted retail prices, hereinafter referred to as 'retail dealers' shall be entitled to a refund of two per cent of first gas

tax" collected pursuant to §208.04, F. S. "No retail dealer shall be entitled to a refund unless: (a) He is the holder of a current certificate of license as prescribed by §208.02; (b) He is the holder of an unrevoked refund permit issued by the state comptroller." (§208.182(1), F. S.). Upon receipt of a refund permit from the state comptroller, the holder thereof may file application for refund; provided, however, that "said application shall be filed quarterly, within six months of date of purchase of gasoline with respect to which refund is claimed . . ." (§208.183, F. S.). (Emphasis supplied.)

The recovery or refund of previously exacted taxes is solely a matter of legislative grace (51 Am. Jur. 1012, §1179). Statutes authorizing a refund of taxes are to be strictly construed against the person seeking refund and in favor of the refunding authorities (People ex rel Herlihy Mid-Continent Co. v. Nudelman, 370 Ill. 237, 18 N. E. 2d 225, text 227; Asmer v. Livingston, 225 S. C. 341, 82 S. E. 2d 465, text 466; 82 C. J. S. 958, §396(d); 84 C. J. S. 1266, § 632). Furthermore, "under statutes conferring privileges on private individuals for a certain period of time, such privileges cannot be exercised after the lapse of time allowed." (82 C. J. S. 877, §379).

In connection with the time within which applications for tax refunds must be filed, it has been said that "the line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim (for refund) within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research." (U. S. v. Memphis Cotton Oil Co., 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619, text 624). It has generally been held that a taxing official has no power to waive a statutory requirement prescribing the time limitations when an application for tax refunds must be filed. (U. S. v. Garbutt, 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405, text 409; 51 Am. Jur. 1013, §1179; Finn v. U. S., 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128).

Section 208.183, supra, requires that applications for refund "shall be filed quarterly, within six months of date of purchase of gasoline with respect to which refund is claimed." There is no question but that the legislature, in using the word "shall," intended that fulfilling the time requirements should be a mandatory prerequisite to obtaining said refund. (See 39 Words and Phrases 111-3). Reading and construing the phrase "shall be filed quarterly, within six months of the date of purchase of gasoline . . ." in favor of the taxing authority, it would appear that "shall be filed quarterly" refers to filing applications for refund at the end of each quarter year, i. e., approximately every 90 days. The purpose of this requirement is obviously to lessen administrative difficulties in persons filing applications daily or weekly instead of four times each year.

However, we think that the requirement that applications for refund must be filed "within six months of date of purchase of gasoline with respect to which refund is claimed" operates as a limitation period and that persons otherwise entitled to file application for refund must strictly comply therewith in order to be eligible for refund under §208.181, et seq.

Your question is answered in the negative.



059-227—November 13, 1959

**SCHOOL CODE****JUVENILE ACCUSED OF LAW VIOLATION—COOPERATION BETWEEN SCHOOL OFFICERS AND LAW ENFORCEMENT OFFICERS—§39.03 AND CHS. 39, 228-237, F. S.**

To: *Alton Murray, Chief Counselor, Juvenile Court of Palm Beach County, West Palm Beach*

**QUESTION:**

**Does the local school have authority to deny an officer of the police, sheriff's department, juvenile court, etc., the right to take into custody a child alleged to have committed a serious violation of the law, either within the school building or on the school grounds during school hours?**

Chapter 39, F. S., relating to juvenile courts, provides for the apprehension, custody and punishment of juvenile law breakers (see specifically §39.03, F. S.).

The Florida school code, Chs. 228 through 237, provide for the duties and authority of the public school system relating to children in attendance in the schools.

I do not find in these laws or any other general law any provision which would authorize school officials to deny law enforcement officers the right to enter school premises for the purpose of apprehending juvenile law breakers if such action is necessary and in accord with the provisions of Ch. 39, F. S. It is the apparent intent of the law that it is the duty of both school officials and law enforcement officers to cooperate fully in dealing with problems of juvenile delinquency in the best interest of the children involved and of society.

Subject to the above observations, your specific question is answered in the negative.

059-228—November 16, 1959

**STATE INSTITUTIONS****FLORIDA STATE UNIVERSITY DINING HALL—AIR CONDITIONING—APPROVAL OF INSTALLATION—§240.102, F. S.**

To: *Forrest M. Kelley, Jr., Architect to Board of Control, Tallahassee*

**QUESTION:**

**Would the installation of air conditioning equipment in the Suwannee room at Florida state university come within the building prohibition expressed in §240.102, F. S.?**

Section 240.102, F. S., provides in part:

(1) No buildings except as hereinafter provided shall be constructed, altered, remodeled, or added to by the state university system without express approval of each such project having first been granted by the legislature. (Emphasis supplied.)

The question herein presented appears to resolve itself into the determination of the scope of legislative intent in enacting this section. Chapter 29701, 1955, passed by the 1955 legislature, from which the above statute was derived, recited in its title:

An act to prohibit the construction of *new buildings* in the state university system without express legislative authority . . . (Emphasis supplied.)

Section 2 of the act further expresses the legislative intent as follows:

. . . This act shall not apply to the construction of new buildings or alterations or remodeling to meet emergencies, as determined by the Board of Control, provided that the total cost of the completed building or completed alterations or completed remodeling shall not exceed ten thousand dollars.

Section 2 was amended by Ch. 57-400 during the 1957 legislative session to increase the amount to \$15,000.

The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature when it enacted the law. (*Heriot v. Pensacola*, 108 Florida 480, 146 So. 654, text 656). This intent is to be gleaned from the language of the statute. (*Overman v. State Board of Control*, 62 So. 2d 696) which should be given a rational and sensible interpretation (*Realty Bond and Share Co. v. Englar*, 104 Fla. 329, 143 So. 152) with due regard to its policy and purpose (*Cox v. Roch*, 348 U. S. 207, 75 Supreme Court 242, 99 L. Ed. 260).

Interpreting this section in light of the above authorities, it appears that the legislative concern was to prevent the state universities, unmindful of legislative priority, from arbitrarily assuming full control and authority in constructing new buildings, remodeling or adding to existing ones or in other ways to alter the inherent physical structure or appearance of university buildings in excess of the monetary limitations placed thereon.

The argument may be advanced that if this equipment does not become attached to the building so as to lose its identity as personalty, its installation would not come within the contemplation of the statute. Although the nature of air conditioning equipment is such that it may conceivably be disassembled and removed from the premises, thereby retaining the characteristics of personalty, the determination of whether the installation of equipment such as this becomes a permanent addition to a building, and therefore a part of the realty, presents a question of fact and intent of the parties (*Ribaudo v. Citizens National Bank of Orlando*, 261 Fed. 2d 929; *Commercial Finance Co. v. Brooksville Hotel Co.*, 98 Fla. 410, 123 So. 814, 64 A. L. R. 1219).

In the instant situation the legislative concern appears directed toward any addition to or alteration of an existing building which would cost in excess of \$15,000 regardless of whether or not such addition technically becomes attached to or a part of the building and the above argument would not be conclusive as to the determination of this question. Therefore, it is my opinion that the installation of an \$80,000 air conditioning system in the Suwannee Room at Florida state university is such an addition to an existing building as would come within the over-all intent and purview of §240.102, F. S.

Accordingly, your specific question is answered in the affirmative.

059-229—November 16, 1959

# TAXATION

## DOCUMENTARY STAMP AND INTANGIBLE TAXES ON NOTES SECURED BY PLEDGE OF REAL ESTATE

MORTGAGE—§§201.08, 199.01 AND 199.02,

F. S.; §1, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

### QUESTIONS:

1. Are promissory notes and similar written obligations to pay money, when secured by the pledge or assignment of a mortgage and the indebtedness secured by it, subject to Florida's documentary stamp and intangible personal property taxing statutes?

2. If such documents are subject to Florida's intangible personal property taxing laws, then what classification do they take?

The promissory note here in question is in the principal sum of \$20,000, payable one-half at the end of the first year and the second half at the end of the second year. The payment of this promissory note is secured by the pledge or assignment of a promissory note, secured by a mortgage encumbering realty located in the state. Upon the payment of the obligation so secured by the pledge or assignment the "assignee agrees to re-assign to the assignors, their heirs, legal representatives or assigns, the pledged note and mortgage, and all subsequent sums that may remain due thereon."

The promissory note secured by the said pledge or assignment is clearly within the purview of §201.08, F. S., without regard to the nature and legal effect of the said pledge or assignment. The promissory note so secured by the said pledge or assignment is clearly an intangible within the purview of §199.01, F. S., and, therefore, subject to taxation under said Ch. 199, F. S., if it has a tax situs in this state. The only problem is whether the documents above mentioned securing the said promissory note bring it within the purview of class "C" intangibles as defined in §199.02, F. S.

The following portion of §1, Art. IX, State Const., to wit, "provided that as to any obligation secured by mortgage, deed of trust or other lien, the legislature may prescribe an intangible tax of not more than two mills on the dollar, which shall be payable at the time such mortgage, deed of trust, or other lien is presented for recordation . . . ." It is noted that such "mortgage, deed of trust or other lien" is not by the constitution limited to such instruments as encumber real property only. However, turning to §199.02(3), F. S., defining class "C" intangibles only obligations "which are secured by mortgage, deed of trust or other lien upon *real property* situated in Florida" are included therein. We construe the constitutional provision as authorizing the legislature to bring those obligations secured by mortgages, deeds of trust, and other liens encumbering *real property* within said constitutional provision without including those encumbering personal property. To construe the constitutional provision otherwise would raise constitutional questions, which this office leaves to the courts. Moreover, in the subject under consideration the primary obligations are not directly secured by a mortgage or other lien. The security is a collateral note which is itself secured by a mortgage but which is not given to secure the primary obligations.

This brings us to the question of whether the pledge or assignment of an obligation secured by a mortgage encumbering real property is of itself an instrument secured by a mortgage, deed of trust, or lien encumbering real property. At common law a mortgage was held to be the conveyance of the legal title to the property mortgaged, by way of pledge or security for the performance of the obligation mentioned (59 C. J. S. 27, §1); however, this rule is not followed in Florida, for in this state a mortgage conveys no title to the property mortgaged, but grants a specific lien on the property so mortgaged (§§697.01 and 697.02, F. S.). In lien theory states, such as Florida, a mortgage on real property is not real property, but is personal property (59 C. J. S. 251, §195). "A mortgage (in Florida) does not create an interest in land. It is a chose in action which creates a lien on land." (Waldock v. Iba, 114 Fla. 786, 153 So. 915). The pledge or assignment of the indebtedness secured by a mortgage on real property, to secure an indebtedness or promissory note of the mortgagee, is the creation of a lien or pledge of personal property (obligation secured by real estate mortgage) to secure an indebtedness. The payment of the obligation is, therefore, secured by a "mortgage, deed of trust, or other lien," not on real property but on personal property, and, therefore, not within the definition of class "C" intangible personal property contained in §199.02(3), F. S.

Question 1 is, therefore, answered in the affirmative. Question 2 is answered by a holding that an obligation secured by the pledge of a mortgage, deed of trust, or other lien encumbering real property, is not of itself a mortgage, deed of trust, or lien encumbering real property, but one encumbering personal property. Under the facts before us the instrument in question would appear to be of classification "class D."

059-230—November 16, 1959

#### TAXATION

##### DOCUMENTARY STAMP TAXES—STOCK VOTING TRUST ARRANGEMENTS—CH. 201, §§201.04 AND 201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Are transfers of shares of corporate stock from their owner to a trustee in connection with a voting trust arrangement subject to taxation under Ch. 201, F. S.?
2. Are voting trust certificates issued in connection with voting trust arrangements subject to taxation under said Ch. 201?

The Florida documentary stamp statutes (Ch. 201, F. S.), was derived from the federal statutes upon the same subjects existing when the Florida law was first adopted in 1931. This being true, it must be construed in the light of the federal decisions upon the federal statutes (Gay v. Inter-County Tel. and Tel. Co., Fla., 60 So. 2d 22, text 23; State v. Cook, 108 Fla. 157, 146 So. 223, text 224). Under the federal law the passage of legal title seems to be a prerequisite to the liability for tax, but when the legal title passes it is immaterial that the transferee receives no beneficial interest (47 C. J. S. 793 and 796, §§550 and 551, notes 28 and 29).



"Under a voting trust agreement, the voting power of the stock is separated from the beneficial interest. The agreement, as such, confers on the trustee the bare legal title and leaves the equitable or beneficial interest in the stockholder . . ." (18 C. J. S. 1259, §552). The stock certificate issued pursuant to the transfer to the trustee may evidence the legal and voting title in the trustee and the equitable or beneficial title in the former legal title holder, or otherwise as the parties may desire. The transfer of the legal title to the voting trustee appears to be within the purview of §201.04, F. S., and subject to taxation thereunder.

The voting trust certificate, like any other certificate issued pursuant to a transfer of title to certificates of stock, is not an original issue of stock and within the purview of §201.05, F. S. It is not issued pursuant to any organization or reorganization of the corporation. Under federal document stamp regulation 113.25, the "issue of voting-trust certificates" is declared not subject to taxation under the federal statutes.

In the light of the above and foregoing, question 1 is answered in the affirmative, and question 2 in the negative.

059-231—November 17, 1959

#### CITIES AND TOWNS

CONTROL OF RATES OF PAY FOR POLICE OFFICERS AND FIREMEN WITHIN SAME RANK, SENIORITY, BONUSES, ETC.—§§174.09, 174.05 AND 174.06, F. S.

To: C. R. Trulock, Captain, Administrative Bureau, City of Orlando

#### QUESTIONS:

1. Is it legal for the city of Orlando, operating under Ch. 174, F. S., to pay different rates of pay to its police officers and firemen of the same rank?

2. Is it legal to pay longevity pay, by which officers of the police and fire departments of the same rank would be paid according to their length of service?

3. If not, would it be legal to pay additional compensation in the form of a bonus, according to the length of service?

Section 174.09, F. S., provides, among other things, as follows:

The governing authority of said municipality shall fix the pay of all members of said police and fire department, provided that members of the *same grade shall each receive the same pay*, and members of a higher grade shall not be paid less than members of the next lower grade.

The governing authority of said municipality shall fix the number of members in each particular grade and may increase or reduce the number of any grade, or may abolish that grade, . . . In the event of a reduction in the number of members in any grade, the members shall be *retained in that grade according to seniority*, and those members thus being forced back to a lower grade or class, will thereafter receive the pay of said lower grade or class, and in the event the grade or class is again increased, shall be first to succeed to said old grade or class according to seniority, without further examination or proba-

tionary period, and in the event a reduction in said force or any grade thereof causes a member of the lowest grade of said force to go into inactive duty, said member or members on inactive duty shall not receive any pay, but said inactive member *shall not lose his seniority*, provided he remains inactive for a period not exceeding one year, and enters on said active duty within ten days after notice has been given him by the secretary of said civil service board that a position is open. After the formation of said board, *a seniority list shall be certified of all members and employees of the police and fire departments* and each member and employee shall in writing assent or dissent to his seniority rating. In the event a member dissents, a hearing shall be held by said board and the seniority determined, and the finding of said board shall be final. (Emphasis supplied.)

Section 174.05 provides for the civil service board of the municipality to adopt a code of rules and regulations for the appointment, employment and discharge of persons in all positions in the police and fire departments, based on merit, efficiency, character and industry.

Section 174.06, F. S., provides that members of the police and fire departments *may be moved from any grade to a higher grade only after passing an examination prescribed by the civil service board*.

In view of the foregoing provisions of Ch. 174, F. S., which relates to civil service for police and firemen, it is my opinion that it would be unlawful for the city of Orlando to pay different rates of pay in the form of salary, bonus or longevity pay to members of its police and fire departments who hold the same rank. It appears that seniority or the length of service in the departments is not a basis for paying different rates of compensation to officers of the same rank, with the exception that if there is a reduction in the number of the members of a grade, the members shall be retained in that grade according to seniority.

Questions 1, 2 and 3 are answered in the negative.

059-232—November 17, 1959

#### LEGISLATION

#### PREVALENCE OF PROVISIONS OF SPECIAL LAW WHEN IN CONFLICT WITH GENERAL LAW

To: Larry Lee, Sebring

#### QUESTION:

**When there is a conflict between the city charter granted to the town of DeSoto City, by Ch. 24483, 1947, and the general law relating to the number which shall compose the city council, which shall control?**

In *City of Orlando v. Evans et al*, 182 So. 264, the supreme court of Florida held that where there is a conflict between the general law and the special charter provisions granted in a legislative act, the special charter provisions will prevail.

I trust the foregoing is the information you requested.

059-233—November 18, 1959

**MOTOR VEHICLES****CONVICTION OF DRIVING WHILE UNDER INFLUENCE OF  
INTOXICATING LIQUORS—AUTHORITY OF JUDGE TO  
RESTORE THE VIOLATOR'S DRIVING PRIVILEGE**

UNDER CH. 59-95—§§322.31, 322.311,

322.28(2)(a), (b), (c), F. S.

To: *Jack M. Turner, Senior Judge, Metropolitan Court, Miami*  
**QUESTION:**

**Does the department of public safety or the convicting judge have the authority to reinstate or restore a violator's driving privilege, with or without conditions and/or restrictions, where the convicting judge has revoked the violator's driver's license as provided in Ch. 59-95?**

Chapter 59-95 repeals §§322.31 and 322.311 and amends §322.28, F. S., to provide that the court, upon conviction of driving a motor vehicle while under the influence of intoxicating liquor, shall revoke the driver's license of the person so convicted and shall prescribe the period of such revocation in accordance with maximum and minimum limitations designated by §322.28(2)(a), F. S. It should be noted that revocation thereof is made mandatory by the legislature.

Section 322.28(2)(b) provides that where the court failed to specify the period of revocation, the department of public safety shall presume that the court's revocation was intended for the maximum period and shall thereupon enforce the court's revocation for the maximum period provided by §322.28(2)(a).

Section 322.28(2)(b) further provides that where the department, in absence of the court's specification as to the period of revocation, has presumed that the maximum period was intended and so proceeds, the driver may within 30 days petition the court for a further hearing on the issue of the period of revocation, presumably for the purpose of determining whether it did in fact intend to impose the maximum period of revocation. Upon such further hearing, the court has discretion to determine the period of revocation within the limitations of subsection (2)(a).

Section 322.28(2)(c) provides that the department of public safety shall entertain applications of drivers whose licenses have been revoked or suspended by it, for the restoration of driving privileges subject to conditions and restrictions which the department deem proper.

It should be noted here that Ch. 59-95 repeals former §322.31 which provided in subsection (1), in cases where a license had been suspended, revoked, or canceled by the department, for application to the parole commission for a modification or revocation of such ruling by the department.

Your question is probably prompted by the legislature's use in subsection (2)(c) of the amended section of the following language:

Any person having his license revoked or suspended by the department of public safety may . . . apply to the department . . . for review . . . and restoration of his driving privileges.

A superficial examination of this wording would seem to indicate that applications for restoration of licenses might be had only where the department had designated the period of suspension or revocation, but not where the court had designated the period of revocation. "When made mandatory by statute, the actual revocation of the license is a mere ministerial or administrative function as distinguished from the exercise of judicial discretion." *Smith v. City of Gainesville*, 93 So. 2d 105, 107. It is the department of public safety upon whom the exercise of this function has been placed by the legislature (§322.02, F. S.). "The legislative mandate applies whether one is convicted by a municipal court or a court of more extensive jurisdiction." (*Smith case, supra*).

The expression of the Florida supreme court in the *Smith case* thus tends to equate the mandatory revocation when done by the court with that of a revocation by the department.

Accordingly, it is my opinion that the department is authorized and required to entertain applications for restoration as set out in §322.28(2)(c) in all cases, whether the term of the revocation or suspension had initially been determined by the court or by the department.

059-234—November 19, 1959

#### CONSERVATION

#### SALE OF MINNOWS FOR FISH BAIT—LICENSES AND LICENSE TAXES—COMMERCE—§30, ART. IV, STATE CONST.; §§372.26 AND 372.65, F. S.

To: *A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee*

#### QUESTIONS:

1. Where Florida regulations require the inspection of minnows brought into this state, for diseases and parasites, may an inspection by the U. S. fish and wildlife service be accepted in lieu of state inspection?

2. Where a licensed wholesale fresh water fish dealer obtains minnows from other states for sale in this state as fish bait, must he, or the person from whom the purchase is made, hold a nonresident dealer's license from this state?

3. Where a nonresident of this state brings minnows into this state for sale as fish bait, what license must be obtained from this state?

4. Where a licensed wholesale fresh water fish dealer of this state raises minnows in another state and brings them into this state for sale as fish bait, must he obtain a nonresident fish dealer's license?

"The management, restoration, conservation, and regulation, of the birds, game, fur-bearing animals, and fresh-water fish, of the State of Florida . . . shall be vested in a commission, to be known as the Game and Fresh Water Fish Commission . . ." (§30, Art. IV, State Const.). This control by the said commission includes "the power to fix bag limits and fix open and closed seasons, on a state-wide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur-bearing animals, fresh



water fish, reptiles and amphibians." (§30, Art. IV, State Const.). The control of the game and fresh water fish commission over the bringing of fresh water fish into this state from other states and countries is only that control necessary to the proper management, restoration, conservation and regulation of the "birds, game, fur-bearing animals and fresh water fish of the State of Florida."

It is the rule in this state that, although "it may be that the state has no authority absolutely to forbid the importation of fish from another state, but as a means for the effective enforcement of its own statutes it may forbid the sale or possession of fish for sale within the state during a closed season, though the effect of such legislation is to prohibit the sale of fish imported from other states" (White v. State, 93 Fla. 905, 113 So. 94, text 95). To effect such a prohibition there must be express language in the statute, rule or regulation making the statute, rule or regulation applicable to foreign taken fish (White v. State, supra; Taylor v. Penton, 99 Fla. 1067, 128 So. 499). "For the protection of its fish within its own waters, the state may regulate the possession and disposition of fish when brought within the state from another jurisdiction" (36 C. J. S. 858, §26). The jurisdiction and control of the game and fresh water fish commission over fish brought into Florida from another state would seem to be an indirect control so as to protect the fresh water fish of Florida and to insure the enforcement of Florida closed seasons. The commission's jurisdiction in this connection is one of protecting Florida fish and not the control of foreign fish.

Should the commission find that inspections by the U. S. fish and wildlife service is a sufficient inspection for the protection of Florida fresh water fish from disease and parasites which might be brought into the state through imported fish, then it would be authorized to adopt such an inspection in lieu of an inspection by it. This seems to answer question 1.

Section 372.26, F. S., provides that "no person shall import into the state or place in any of the fresh waters of the state any fresh water fish of any species without having first obtained a permit from the game and fresh water fish commission." We presume that this section of the statute will have been complied with before the minnows in question are brought into the state for sale as contemplated by questions 2, 3 and 4, as compliance therewith seems to be a condition to bringing fresh water fish into this state from another state or country. Any one engaged in the business of selling fresh water fish in this state, either at wholesale or at retail, is required to obtain a fresh water fish dealers license, either wholesale or retail as the case may be. Such licenses are further divided into resident and nonresident or alien dealers (§372.65, F. S.). As used in said §372.65, the term "nonresident" refers to a dealer who, although he may transact business in this state, is not residing or dwelling within this state; that is such dealer resides beyond the limits of Florida. The fact that a resident of this state buys minnows from persons in other states, and brings them into this state for sale, does not make him a nonresident dealer.

Where a resident of another state takes orders from persons in this state, whether dealers or otherwise, fills such orders and sends them to the purchaser by interstate transportation, the transaction would be one of the state where the order was accepted and

filled and not a Florida transaction. Only when the transaction was a Florida transaction would there be a doing of business in this state requiring a Florida license. However, should a producer of minnows in another state send minnows into this state and sell them from a moving vehicle (thereby becoming a peddler) would there seem to be a transaction of business in this state, *or, if such nonresident established a place of business in this state, from which orders were accepted and filled, then he would be required to obtain a Florida license.* In the case mentioned in question 3 only when the nonresident establishes a place of business in this state (including peddling) does he become liable for the license tax. The mere delivery of minnows pursuant to orders previously taken, or phoned in or sent in by mail, to a place of business in another state is not a Florida business transaction although the minnows may be delivered pursuant thereto in this state.

Therefore, question 2 is answered in the negative.

Question 3 depends upon whether the transaction constitutes a doing of business in this state, as above defined.

Question 4 is answered in the negative.

With further reference to question 2, a purchase of minnows, by a Florida fish dealer, from a resident of another state usually would be a contract of the state where the minnows were procured, and this would not be changed where the minnows are delivered by their nonresident producer when such delivery is made pursuant to order sent from Florida to such other state and there accepted and filled. Only when the transaction is a Florida contract would there be a transaction of business in Florida, such as the sale of minnows from a (peddler's) truck.

059-235—November 23, 1959

#### SCHOOL CODE

#### PERSONNEL—COUNTY SCHOOL SUPERINTENDENT— GRANT OF CONTINUING CONTRACT—§231.36(4) F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### STATEMENT OF FACTS:

A county school superintendent was unsuccessful when he stood for reelection in the year 1956. Since there was no teaching position open in January 1957 he taught in another county until June 1957. He reentered teaching in August 1957 in his home county where he had served as county superintendent. He has taught in this last position for two years.

#### QUESTIONS:

1. Under the provisions of §231.36(4), F. S. (Ch. 59-359) could he now be issued a continuing contract?
2. If the answer to question 1 should be in the negative would he be entitled to a continuing contract at any time and if so, when?

Section 231.36(4), (Ch. 59-359), passed by the 1959 legislature, provides:

The county board of public instruction of any given county may, at its own discretion, grant to a person who

has served as county superintendent of public instruction in that county, at the completion of his service as superintendent, a continuing contract as a classroom teacher. Service as superintendent shall be construed as continuous teaching service in the public schools of this state.

This act provides discretionary authority for a county school board to count service as a county school superintendent as continuous teaching service for the purpose of granting a continuing contract.

The language in the act "at the completion of his service as superintendent" should be noted in construing the intent of the legislature. In other words, the board under this provision may if it so desires grant an outgoing county school superintendent a continuing contract as a teacher at the end of his term as superintendent or within a reasonable time thereafter. In my opinion, the board should act under this provision either by granting the continuing contract or refusing to grant it within a reasonable time and such action should not be held in abeyance for an indefinite time. I doubt that a board composed of different members several years after the superintendent completed his term would be authorized to grant a continuing contract under this provision.

Under the facts related in this instance, however, less than a year elapsed before the superintendent in question started teaching in the same county after his term as superintendent ended. Under these circumstances, it is my opinion that the board could at its discretion award a continuing contract based on the former superintendent's years of service as a superintendent and his appointment to teach in the county school system during the same year that his term as superintendent ended.

Question 1 is therefore answered in the affirmative subject to the above comments.

No answer is required to question 2 since question 1 is answered in the affirmative.

059-236—November 25, 1959

### CRIMINAL PROCEDURE

#### PROCEDURE FOR DISPOSITION OF MONEY SEIZED BY ARRESTING OFFICERS IN LOTTERY AND OTHER GAMBLING CASES—§§568.10, 790.08, 849.12 AND 933.14, F. S.

To: A. J. Musselman, Jr., Assistant State Attorney, Fort Lauderdale

#### QUESTIONS:

1. Are moneys which are confiscated by arresting officers in lottery and other gambling cases automatically forfeited to the county unless a protest is made by the defendant or person claiming an interest in said funds?

2. Do the provisions of §849.12, F. S., require the state attorney to file a civil proceeding to forfeit moneys in lottery and other gambling cases in every case where such moneys have been seized by the arresting officers?

Section 568.10, F. S., has to do with the confiscation and forfeiture of liquor seized by arresting officers and this section provides that upon the conviction of the person arrested for violating the beverage laws, the judge of the court trying the case, *after such*

*notice to the person convicted and any other person whom the judge may be of the opinion is entitled to such notice, as the judge may deem reasonable, shall issue to the sheriff of the county a written order adjudging and declaring such intoxicating liquors, wines or beers forfeited, and directing the sheriff to dispose of the liquors and allow the money received from the sale to be paid into the general fund of the county.*

Section 790.08, F. S., relates to the forfeiture of weapons and firearms and provides that if a person arrested for illegal possession of weapons and firearms is convicted under a municipal ordinance or law having to do with illegal use or attempted use of such weapons or firearms, such weapons or arms shall be forfeited to the state, without any order of forfeiture being necessary *although the making of such an order shall be deemed proper.*

It will be noted that §933.14, F. S., relating to return of property taken under search warrant, if no probable cause is found by the magistrate or judge before whom a search warrant is returned, then the judge may order a return of the property taken, provided that this authority to return property does not extend to contraband such as slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets, or other gambling devices, paraphernalia or equipment, or to narcotic drugs, obscene prints and literature, it being the specific intent of the legislature that no one has any property rights subject to be protected by any constitutional provision in such contraband.

The word "money" does not appear in this list and from the holding by the supreme court of Florida in *State ex rel Caraker v. Amidon*, 68 So. 2d 403, it would appear that the trial court, at the time of imposing judgment and sentence on a convicted person for violation of the lottery laws, could provide in said judgment and sentence for the forfeiture of moneys and paraphernalia used in the lottery, but in the absence of such judgment of forfeiture, in order for the moneys which were seized in connection with the operation of a lottery or other gambling enterprise to be placed in the fine and forfeiture fund and used by the county, it appears that it will be necessary for the state to proceed in a civil action.

Considering the case of *State ex rel Padgett et al v. Circuit Court of 11th Judicial Circuit in and for Dade County, et al*, 110 Fla. 46, 148 So. 522, it appears that "a person found with gambling devices in his possession may be convicted, and a part of the judgment of conviction may be the forfeiture of the gambling devices." However, as pointed out in the *Padgett* case and in *State ex rel Roque v. Criminal Court of Record of Hillsborough County et al*, 7 So. 2d 131, the amount of money involved often determines the court in which the forfeiture proceeding will be had.

From these authorities, it is my opinion that money seized by law enforcement officers in connection with the operation of a lottery or gambling game is not automatically forfeited to the state. If the amount of money involved is not too large, apparently the trial court (criminal court of record) could adjudge the forfeiture at the time of trial, judgment and sentence; otherwise the proceedings must be by civil procedure in the circuit court under the provisions of §849.12, F. S. (See *State v. Simmons*, 85 So. 2d 879.)



059-237—November 25, 1959

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
PEACE RIVER VALLEY WATER CONSERVATION AND  
DRAINAGE DISTRICT — FEES AUTHORIZED FOR  
COUNTY CLERKS, TAX ASSESSORS AND COL-  
LECTORS — §6, CH. 59-1002; §193.65, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

What fees and commissions are county tax assessors, tax collectors and clerks of the circuit courts, within the Peace river valley water conservation and drainage district, entitled to in connection with the levy and collection of district taxes?

Chapter 59-1002 established the Peace river valley water conservation and drainage district, extending into the counties of Charlotte, DeSoto, Hardee and Polk. Section 6 of this act authorizes a district tax, for the purpose of financing the district, not in excess of 1/5 mill per dollar on the county assessed value of the lands within the district. This section further provides that "*the tax assessor, tax collector, and clerk of the circuit court of each county within the district shall be entitled to compensation for services performed at the same rates as apply to county taxes.*" (Emphasis supplied.)

Section 193.65, F. S., provides certain fees and commissions "*on the county general tax*" and another schedule of fees and commissions on assessments made for "*each taxing district,*" (emphasis supplied) for the tax assessor and tax collector (see §193.65 (1) and (2)). Although the Peace river valley water conservation and drainage district might be classified as a *district* generally under said §193.65, F. S., for purposes of officers' fees and commissions, it must be remembered that Ch. 59-1002 above mentioned, fixes the fees and compensation "*at the same rates as apply to county taxes,*" not at the same rates as apply to district taxes. It seems evident that the fees and commissions contemplated by §6 of Ch. 59-1002 are the fees fixed in §193.65 for collecting the county general tax, not the taxes of the taxing districts therein mentioned.

The above observations answer the above question.

059-238—November 25, 1959

**TAXATION**

**OCCUPATIONAL LICENSES — FORTUNE TELLERS — APPLI-  
CATION OF §205.411, F. S. — §§205.41, 205.11, 205.65, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

Is a fortune teller, clairvoyant, etc., mentioned in §205.41, F. S., violating the licensing laws of this state when he or she practices fortune telling, etc., after October 1 of any year, without having obtained the permit mentioned in §205.411, although holding a license for the previous year?

Section 205.411, F. S., requires a permit, to be issued by the board of county commissioners, as a condition precedent to

obtaining an occupational license as a fortune teller, clairvoyant, etc., under §205.41, F. S. Under §205.41(2), no public officer may issue a license except pursuant to the permit therein mentioned. Under subsection (5) of the same section "anyone guilty of engaging in any occupation comprehended by §205.41 without a license and the permit required by this section... shall, for the first offense" be punished as therein provided. Although §205.11, F. S., declares the operation of a business for 90 days after the expiration of the license therefor delinquent and requires that the tax collector issue a tax warrant for the collection of the license tax, such section relates to the collection of a delinquent tax and not to the transacting of a business without a license. Under §205.65, F. S., "any person who shall carry on or conduct any business or profession for which a license is required, without first obtaining such license shall . . . be guilty of a misdemeanor."

We, therefore, construe §205.11, F. S., as relating to the duties of the tax collector, as to the issuance of tax warrants for the collection of license taxes, and not as permitting the operation of a business for 90 days without a license; that a person who operates a business without a license, although he may have held a license for the previous year, is in violation of §205.65, from the expiration of his previous license, and fortune tellers, clairvoyants, etc., are in violation of §205.411 when they operate, although they held a permit and license for the previous license year, without the permit and license required.

The above question is answered in the affirmative.

059-239—November 25, 1959

#### TAXATION—REGULATION OF PROFESSIONS AND VOCATIONS

ISSUANCE OF OCCUPATIONAL LICENSE UNDER CH. 205, F. S., TO PERSONS NOT REGISTERED UNDER REGULATORY LAWS—§§205.051, 461.03; CHS. 59-1798 AND 59-1799

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Should a county tax collector refuse to issue a license, and accept a license tax for any of the occupations or professions mentioned in Ch. 205, F. S., which are under statutory regulation, unless and until a duly issued regulatory certificate is exhibited to the tax collector?

Although §205.051, F. S., prohibits the issuance of occupational licenses for the practice of medicine in this state unless and until a duly issued regulatory certificate is exhibited to the tax collector, and §461.03, relating to the regulation of the practice of chiropody and possibly other regulatory statutes, make a like requirement, as a condition to being issued a regulatory license under Ch. 205, F. S., we find no general statutory requirement as to occupations and professions generally.

Your request for opinion specifically mentions Chs. 59-1798, regulating the practice of plumbing, and 59-1799, regulating the practice of electrical contracting, each applicable to Saint Lucie

county; we have examined these statutes and find no requirement therein that professional certificates duly issued thereunder be exhibited to the county tax collector as a condition to the issuance of an occupational license under Ch. 205, F. S.

As a general rule an occupational license will not protect the licensee in pursuing an occupation in violation of the criminal laws of the state (53 C. J. S. 642, §42). The fact that a person may be issued a regulatory license will not authorize him to exercise the privilege granted without his also procuring an occupational license, when one is required; and the reverse is also true.

We, therefore, feel that a tax collector is required to require the presentation of a regulatory certificate of professional qualification only in those cases where the same is required by some statute or law. This would not prevent a tax collector advising persons applying for licenses under Ch. 205, F. S., for regulated professions and occupations, that a license issued under Ch. 205 will not protect one from prosecution when other statutes require qualification under regulatory laws or statutes.

059-240—November 25, 1959

#### AERONAUTICS

#### ACQUISITION OF REAL PROPERTY FOR AIRPORT— CONDITIONAL GIFT—§§332.02(2), 332.01(1), 334.02(9) AND 338.01, 338.02 F. S.

To: *James C. Robinson, County Attorney, Orlando*

#### QUESTION:

**May Orange county accept a donation of land for airport purposes on condition that the county will provide arterial and limited access roads to the airport at some future time?**

In regard to your inquiry §332.02, F. S., provides for the acquisition of real property for airports. In particular, subsection (2) provides:

(2) Property needed by a municipality for an airport . . . may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition. . . . *Any title to real property so acquired shall be in fee simple, absolute and unqualified in any way, or any lesser interest therein. . . .* (Emphasis supplied.)

It should be noted that §332.01 (1) provides that: "Municipality" means any county, city, village or town of this state." In view of the specific limitation contained in §332.02, supra, it would appear that the county may not acquire property by gift for airport purposes with a condition attached to the deed since said condition would seem to qualify the interest conveyed; and failure to comply therewith may cause the title to revert back to the donor although the gift itself, without condition, would appear to satisfy the provisions of §332.02, supra.

Whether the county could bind itself, independent of any provision in the deed, would depend upon the condition to be performed and the circumstances surrounding the performance thereof. It is stated in 20 C. J. S., Counties, §174, pp. 1006-7:

The state legislature may prescribe the terms on which a county may voluntarily enter into contractual relations, and the county can contract only in the manner and for the purposes provided by the statute; and can make no contract not authorized by statute. Statutory provisions governing contracts by county officers are restrictions for the protection of the people and should be so construed. *A county cannot, by contract, embarrass or surrender its ability to function in the future.* (Emphasis supplied.)

The condition involved herein *requires* that the county provide arterial and limited access roads to reach the proposed airport; whereas, under §338.02, F. S., the county *may* designate and establish limited access highways. The establishment or designation of these limited access facilities would be dependent upon the consideration of such matters as:

1. Whether the designation of limited access facilities would be justified in view of the definition of such facilities under §334.02 (9).

2. Whether the necessity exists for making the limited access roads part of the county road system.

3. Whether traffic conditions are such as to justify such special facilities under §338.01.

4. Whether such limited access roads would benefit the county as a whole, as opposed to a limited class of private individuals.

5. Whether road funds are available to finance these special facilities.

It should also be pointed out that it may be contrary to public policy for the county, acting through its board of county commissioners, to enter into a contract extending beyond the term of the existing board, which act would result in tying the hands of the succeeding board and depriving the said board of its proper powers, *in absence of a showing of good faith, public interest, and necessity therefor.* (20 C. J. S., supra, §176, pp. 1009-10.)

It would appear that, as a matter of public policy, a county should not undertake to bind itself to perform conditions at some future date since intervening circumstances may render performance unfeasible or impossible.

Your question is answered in the negative, subject to the foregoing comments.

059-241—November 25, 1959

#### PUBLIC LANDS AND PROPERTY

TRUSTEES INTERNAL IMPROVEMENT FUND—AUTHORITY TO CONSTRUCT DOCKS, PIERS, WHARVES AND SIMILAR STRUCTURES—CH. 253; §§271.01 (REPEALED BY CH. 57-362), 253.03 (CH. 15642, 1931), 253.12 (AM. BY CH. 26776, 1951), 253.121-253.129, 270.01, 270.13, 270.14, 270.22, 309.01, F. S.

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

#### QUESTIONS:

1. What authority, if any, do the trustees of the internal improvement fund have in connection with the



construction of docks, piers, wharves and similar structures in the navigable waters of the state?

2. Should formal approval by the trustees be required as to each particular structure, or may the trustees regulate the same, in whole or in part, by rules and regulations?

AS TO QUESTION 1:

56 Am. Jur. 1067, §5, after stating the rule, in this connection, in England, states that:

In this country, while the question of riparian rights is settled by each state for itself, it is the generally accepted doctrine that a riparian or littoral owner may build and maintain, for his own and the public use, suitable wharves, piers and landings on and in front of his land, and extend the same therefrom into the water to the point of navigability, subject only to the rights of the public as to navigation and commerce, and to such needful rules and regulations for their protection as may be prescribed by competent legislative authority. . . .

It is stated in *Freed v. Miami Beach Pier Corp.*, 93 Fla. 888, 112 So. 841, text 844, that:

Riparian or littoral owners to ordinary highwater mark on the ocean or gulf or other navigable waters have, by common law, a qualified right *with the consent or acquiescence of the state . . .* to erect wharves or piers or docks in front of the riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation and to the dominant powers of Congress . . . (Emphasis supplied.)

To the same effect, see also, *Ferry Pass Inspectors' and Shippers' Ass'n v. White's River Inspectors' and Shippers' Ass'n*, 57 Fla. 399, 48 So. 643, text 645; *Thiesen v. Gulf, Florida and Alabama Railway Co.*, 75 Fla. 28, 78 So. 491, 501-503; *Williams v. Guthrie*, 102 Fla. 1047, 137 So. 682, text 685; and *Adams v. Elliott*, 128 Fla. 79, 174 So. 731, text 733.

In *Sullivan v. Moreno*, 19 Fla. 200, text 228, the court remarked that:

A wharf is therefore a purpresture, the construction of which was subject to sovereign control, and the deposit of stone or other like material in navigable waters was subject to like control by the State by virtue of its right to the soil and its duty to protect the commerce of the port or harbor. The sovereign here, the State of Florida, has declared that the building of wharves is for the benefit of commerce, and has authorized the construction of wharves generally in such ports and harbors and the deposit of proper material to fill up from the shore as far as may be desired, "not obstructing the channel, but leaving full space for the requirements of commerce."

The reference is to the act of 1856, which was amended by the so-called Butler act and became §270.01, et seq., F. S. To the same effect see also, *Thiesen v. Gulf, Florida and Alabama Railway Co.*, supra, text 503. The effect of these decisions is to hold that former §271.01, F. S., was a legislative authorization to construct docks, piers, wharves and similar structures. However,

said §271.01, F. S., was expressly repealed by §9, Ch. 57-362, and may have been repealed by implication by Ch. 26776, 1951 (see *Duval Eng. and Constr. Co. v. Sales, Fla.*, 77 So. 2d 431). This leads to the question of whether there are any other statutes granting the right to construct docks, piers, wharves and similar structures, or making provision for the granting of such rights.

The opinion in *Hicks v. State*, 116 Fla. 603, 156 So. 603, is of interest in this connection. There the trustees of the internal improvement fund of this state had granted to the bond trustees of road and bridge district No. 1 in Alachua county, the right to occupy, use and improve for public purposes "an area of approximately 25 x 75 feet, at a point where the public road along the south boundary of sections 20, 21, township 8 south, range 22 east, connects with and abuts upon the high water of said Lake Santa Fe," which lands were said to be "an extension of a public road leading to the edge of Lake Santa Fe." The improvements involved in the litigation were said by the court to be "erected improvements of the character authorized by the permit so as to provide access to the lake." The court added the following:

It appears from the said resolution that it was the intention of the trustees of the internal improvement fund to grant a special and limited use permit to the bond trustees of road and bridge district No. 1 of Alachua county, to run only so long as the premises should be used and maintained for the purposes of public convenience specified in the instrument, . . .

The permit pleaded by the respondent in the court below as having been executed and granted by the trustees of the internal improvement fund is expressly authorized by a special statute that vests power in the trustees of the internal improvement fund to administer, manage, control, supervise, conserve, and protect all lands owned by the state of Florida by right of sovereignty, when not vested by law in some other state agency. Chapter 15642, Acts 1931, (Ex. Sess.) §1, . . .

. . . And, as a statutory body, the trustees of the internal improvement fund are vested with a wide variety of powers, duties, and responsibilities in addition to their several responsibilities as trustees under the original trust which brought the trustees of the internal improvement fund into being. . . .

We hold the rejected answer (plea) interposed May 1, 1933, to be a good defense. . . .

Section 1 of Ch. 15642, 1931, is now §253.03, F. S.

Our examination of the minutes and records of the trustees of the internal improvement fund of Florida reveals that they have been granting leases encumbering lands vested in them at least during and since 1917, as well as land permits, easements, rights of way, etc., up to the present time. At the time of the amendment of §253.12, F. S., by Ch. 26776, 1951, the trustees had issued more than 700 such leases, permits, easements, rights of way, etc., clearly showing that they construed their powers under Ch. 253, F. S., (including internal improvement, swamp and overflowed, submerged sovereignty, and 1931 settlement and other lands) to extend to the making of leases, the granting of permits, easements, rights of way, and similar powers. This shows a de-

partmental construction by the trustees that Ch. 253, F. S., vests them, in addition to the power of sale over such lands, with power to lease, rent, license the use, etc., over said lands. This construction is entitled to great weight when construing such statutes (*Johnson v. State*, Fla. 91 So. 2d 185; *Florida State Racing Comm. v. McLaughlin*, Fla., 102 So. 2d 574; *Green v. Stuckey's of Fanning Springs, Inc.*, Fla., 99 So. 2d 867). The legislature appears to have concurred in this same construction, which action of the legislature is likewise entitled to great weight when construing the statute (*State v. Lee*, 114 So. 855, 155 So. 138; *Johnson v. State*, Fla., 91 So. 2d 185). The action of the legislature in this connection is set out in the next paragraph hereof.

Under §270.22, F. S., "the proceeds of state land, whether from sale, lease, rental, or the sale, lease or rental of products in, on or under said lands, title to which may be vested in the trustees of the internal improvement fund . . . shall be paid into the internal improvement fund." Under §270.14, F. S., "in determining the twenty-five per cent to be paid to the state school fund, said amount shall be ascertained after all . . . current expenses have been allowed in connection with such sale, lease or rent. . . ." Under §270.13, F. S., certain funds "derived from the lease or rental" of trustee lands are payable into the state school fund. These sections of the statute seem to contemplate a power in the trustees to rent and lease as well as sell real property, lending some argument to the contention that the power of sale vested in the trustees includes the transfer of lesser estates. (See 72 C. J. S. 422, §25, notes 79 and 80).

The powers of the trustees, under §253.03, F. S., to administer (2 C. J. S. 54, notes 96 to 3), manage (55 C. J. S. 1-4), control (18 C. J. S. 32-34), supervise (83 C. J. S. 899-901), conserve and protect the lands and properties mentioned in said section are broad powers which may well be held to extend to the leasing, letting and granting of permits for the use of such property so long as the rights of the general public are not interfered with. This seems to have been the construction placed on said section by the court in *Hicks v. State*, supra.

The question arises as to the effect, if any, of the adoption of Ch. 57-362 (§§253.121-253.129, F. S.), upon §309.01, F. S. The legislature, by Ch. 1900, 1872, regulated the dumping of stone, earth, and other materials, in ports, harbors, bays and rivers. This act was repealed by Ch. 3142, 1879, which act was entitled "An Act for the protection of Ports, Harbors, Bays and Rivers in this State," which act was amended by Ch. 3298, 1881, the title to which indicates an intention to protect ports, harbors, bays and rivers of this state. These laws were brought into the Revised Statutes of 1892, as §936, which section was amended by Ch. 4370, 1895, its title indicating its purpose as "the protection of ports and harbors."

Under said §309.01, no person, firm or corporation may discharge, deposit, dump or otherwise place any stone, rock, pebbles or debris in the tidal waters of any bay, port, harbor or river of this state, except as provided in and by said section. Such stone, rock, pebbles or debris, if placed in such tidal waters, may be so placed only in connection with the construction of wharves, piers, quays, jetties or bulkheads. Such wharves, piers, quays and jetties, if of solid construction, must be protected by bulkheads so constructed

as to retain such stone, rocks, pebbles or debris so that the same may not obstruct the bay, port, harbor or river, or its use. The section designates three types of bulkheads which may be used for the purposes aforesaid. In this connection see *Hannah v. Martin*, Fla., 37 So. 2d 579, and 49 So. 2d 585, in which case the court held an extension of waterfront lots into Biscayne bay without retaining bulkheading to be violative of this section.

The purpose of enacting Ch. 57-362 was to provide a uniform methods for both fixing bulkhead lines and regulating fill operations throughout the state. No mention is made in said chapter as to the right of a riparian owner to construct docks and wharves. In absence of any existing statutory authority to construct such docks and wharves and in view of the fact that the previous authority was specifically repealed in 1957, it would appear that the consent or authorization by the state through the trustees is necessary before the upland riparian owner can construct such docks and wharves. This conclusion would appear to be supported by the cases previously cited in this opinion.

I am unable to find any other statutory authority for riparian owners to construct wharves and docks. Section 309.01, F. S., relates to the *protection* of ports and harbors and *regulates* the manner of filling in submerged lands so that no injury will occur to navigation or to ports and harbors. Section 309.01 must be read in conjunction with the applicable provisions of Ch. 57-362 relating thereto. Each has a separate field of operation and are not necessarily repugnant. Section 309.01 only operates after permission has been first duly obtained from the trustees.

In light of the above statements and in view of the effect of Ch. 26776, 1951, and Ch. 57-362, on section 271.01, F. S., it is necessary for upland riparian owners to secure consent and approval before constructing docks and wharves. This approval may come directly from the trustees where no fill is contemplated, or approval may be secured in accordance with the provisions of §253.124 in the event filling is necessary. This answers question 1.

#### AS TO QUESTION 2:

It is pointed out in your letter that the trustees since 1957, have never questioned the right of the riparian owners to construct docks and wharves and have waived objection thereto where the applicant-upland owner was issued a permit by the U. S. army corps of engineers and only in those instances where the construction would not infringe upon public or private rights. Based upon the statements made in answer to question 1, it would be advisable for the trustees (or appropriate body under §253.124) to formally approve the construction of docks and wharves by upland riparian owners. The license or permit issued by the army engineers are not grants of power to construct. They are merely the findings and declarations that the structure of work will not be detrimental to navigation and, standing alone, do not supersede the control of the state over its navigable waters and lands under water (see 65 C. J. S., §11, p. 67). Hence, the right to construct docks and wharves is subject to state rules and regulations applicable thereto which have been adopted under the police powers of the state and are not in conflict with federal control over commerce.

However, it is pointed out that it may not be necessary that an individual permit be processed in each case. When an offshore area is bulkheaded pursuant to §253.122, et seq., the official docu-



ment establishing the bulkhead line may indicate that certain types of wharves, docks, piers and similar structures are authorized without further application or the trustees may adopt simplified procedures in cooperation with the U. S. army corps of engineers to grant applications for wharves, docks, piers and similar structures or they may adopt other rules and regulations for such purpose.

No doubt there will be cases where the trustees would deny the right to construct particular structures; those, for example, which would interfere with public beaches or waterways or the rights of other upland or riparian proprietors, or those structures which, because of their proposed size, extent or utility or juxtaposition to other structures or uses, would unduly interfere with the rights of the general public or the inalienable trust of the people in navigable waters or which would be likely to create nuisances. In those particular cases, the trustees might require individual applications and advertising to give notice for objections. As we have seen in *Hicks v. State*, supra, once permission is granted for a structure jutting out into sovereignty water, private rights issue.

In the absence of specific legislation (local, special or otherwise) regulating the location and construction of docks, piers, wharves and similar structures, approval by the trustees of the internal improvement fund is required when such structures are to be constructed in navigable waters; otherwise, they may become purprestures. This approval may be given specifically as to particular structures or may be by rules and regulations where general approval may be applicable. Where such structures are located and constructed pursuant to rules and regulations such structures must comply with such rules and regulations; otherwise, they might constitute purprestures. Where such a structure is not within such rules and regulations, special hearings and approval after advertising for objections, in accordance with §253.12, F. S., should be required.

059-242—November 25, 1959

#### TAXATION

#### DOCUMENTARY STAMP TAXES—DEEDS ASSUMING, TAKEN SUBJECT TO EXISTING MORTGAGES—§201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

What is the proper amount of documentary stamp tax due under Ch. 201, F. S., on:

1. A deed wherein real property is purchased subject to an existing mortgage;
2. A deed wherein an existing mortgage is expressly assumed, or assumed by collateral agreement arising out of the same transaction involving the purchase by deed?

"On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefor" there is imposed a state documentary stamp tax of 20¢ (§201.02, F. S.). Under the preceding section, only one taking real property as a "purchaser"

is subject to the tax (State ex rel Palmer-Florida Corp. v. Green, Fla., 88 So. 2d 493); furthermore, said section applies only to those transfers given for a monetary consideration and does not apply where an absolute gift is made of the property (Culbreath v. Reid, Fla., 65 So. 2d 556). As a general rule, when a documentary stamp tax is sought to be levied "the law contemplates that such tax should be confined to the actual monetary consideration or to considerations which have a reasonably determinable pecuniary value." (DeVore v. Gay, Fla., 39 So. 2d 796, text 797). Only those considerations having a monetary or pecuniary value may be taken into account in computing documentary stamp taxes under §201.02, *supra*.

"When a conveyance of land is made expressly subject to an existing mortgage . . . the purchaser takes merely the equity of redemption, and the conveyance amounts merely to a conveyance of whatever interest or estate the grantor has after the debt is satisfied out of the land." (59 C. J. S. 561, §397). The mere statement in a deed of conveyance that the real estate is conveyed to the grantee subject to an existing mortgage does not make the grantee personally liable for the payment of the existing mortgage debt. (Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61). Furthermore, the recital in a deed that the deed is "subject to" an existing mortgage is not sufficient to create an obligation on the part of the grantee to undertake payment of said mortgage (Fort Pierce Bank & Trust Co. v. Smith, 108 Fla. 313, 146 So. 225, text 227).

It thus seems clear from the foregoing authorities that a grantee under a deed taken subject to an existing mortgage is not personally liable for the payment of the mortgage. Furthermore, since there is no obligation on the part of the grantee to pay the mortgage, there is no consideration passing between the parties such as could be reduced to a monetary or pecuniary value.

A different situation arises where the grantee *assumes* an existing mortgage. "It may be assumed to be settled in this state that when a deed contains a covenant by the grantee assuming and agreeing to pay a mortgage on the land, and the deed is accepted by him, he obligates himself to pay the mortgage debt as conclusively as if he had signed a written agreement to that effect as a part of the consideration to be paid for the lands conveyed." (Emphasis supplied.) (Ackely v. Noggle, 97 Fla. 640, 121 So. 882, text 883). Furthermore, "it is not necessary that the assumption agreement be incorporated in the deed of conveyance where the debt assumed represents a part of the consideration of purchase of the property concerned, or even that it should be in writing; a parol agreement by the grantee at the time of the taking of the deed being sufficient. Enns-Halbe Co. v. Templeton, 101 Fla. 609, 135 So. 135." (Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61, text 65; Yates v. St. Johns Beach Devel. Co., 129 Fla. 429, 176 So. 422, text 423). This is in accord with the general rule that the assumption of an existing mortgage is and constitutes a part of the consideration for a conveyance by deed (20 C. J. S. 612, §17) and that the assumption of the existing mortgage debt need not be incorporated into the conveyance but may be contained in a separate written agreement, or parol agreement except where otherwise provided by statute (59 C. J. S. 574, §406c). Accordingly, it would appear that the assumption of an existing mortgage by the grantee to a

deed of purchase (either by express recital in the deed itself, collateral written agreement, or parol agreement at the time of taking of the deed) constitutes a "consideration" for the deed within the meaning of §201.02, to the same extent as if the grantee therein had executed a purchase money mortgage as a part of the consideration.

In answer to question 1, the proper amount of documentary stamp tax due on a deed wherein the grantee purchases real property *subject to* an existing mortgage should be computed on the monetary or pecuniary consideration paid for the land, exclusive of the amount of the existing mortgage. Whereas, in question 2, where an existing mortgage, or mortgages, is *assumed* by the grantee in the deed, either by express recital in the deed, collateral written agreement, or parol agreement at the time of taking of the deed, the tax should be computed by adding the outstanding balance due on the assumed mortgage to other monetary or pecuniary considerations paid for the deed.

The above observations appear to answer your questions. Your file is returned herewith.

059-243—November 25, 1959

#### TAXATION

#### DOCUMENTARY STAMP TAXES—CONVEYANCES IN CONNECTION WITH PROPERTY SETTLEMENTS—§201.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where a husband and wife are vested with title to certain real property, as an estate by the entirety, subject to a mortgage for which they are liable, and the wife conveys her interest in such property to the husband in consideration of his consent to a decree awarding her alimony, support money and property settlement agreement, is such conveyance subject to taxation under §201.02, F. S., and if so, what is the measure of such tax?

The conveyance states the consideration to be \$1 and the settlement agreement pursuant to which the decree above mentioned was entered. There is a covenant in the deed binding the grantee husband to pay a purchase mortgage having a balance due thereon of about \$66,000; however, it is our information that the obligation above mentioned, having a balance due thereon of \$66,000, was executed by the said husband and wife so that the husband was already obligated to pay the said balance due as his personal obligation. The provision for payment of the mortgage added nothing to his obligation on the balance due; it amounted to nothing more than an agreement between him and his wife that he would comply with his prior obligation to pay the indebtedness. This promise does not appear to have been given as consideration for the transfer of the property between husband and wife as it added nothing to the existing obligation of the husband to pay the said obligation. This conclusion is based upon facts appearing in a letter from R. F. Maguire to Arthur Newell under date of Nov. 2, 1959, which we presume to be correct.

The consideration passing from the grantee to the grantor

appears to have been an agreement of Dec. 31, 1958, which is defined in the preamble to the conveyance as an agreement, by and between the parties (husband and wife) making provision for alimony, support money and property settlement, whereunder the wife conveyed the property in question in consideration of the husband's agreement to pay alimony, support money and make division of their property to and with the wife. Doubtless the alimony and support money are payable until the death or remarriage of the wife, or maybe to a fixed date. There is no evidence in the file as to the alimony and support money payments, either as to amount or periods of payment, or when they terminate. There is nothing in the file to show the amount of the consideration passing from the husband to the wife for the conveyance. Doubtless there was some kind of consideration passing to him.

The answer to the above question depends upon the consideration passing from the husband (grantee) to the wife (grantor) for the conveyance of the lands described in the deed, and whether there was a monetary consideration capable of present calculation (see *Culbreath v. Reid*, Fla., 65 So. 2d 556; *DeVore v. Gay*, Fla., 39 So. 2d 796).

Under the facts before us, we are unable to answer the above question; however, we feel that we have here furnished a formula for determining tax, if any.

059-244—November 25, 1959  
(Revised February 25, 1960)

#### TAXATION

##### DOCUMENTARY STAMP TAXES—CONTRACTS FOR SALE AND CONVEYANCE OF REALTY—§§201.02, 201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are written agreements for the sale and conveyance of real property subject to taxation under Ch. 201, F. S., and if so, under what sections taxable?**

A reading of Ch. 201, F. S., indicates that the only sections reasonably to be considered applicable would be §§201.02 and 201.08, F. S. Section 201.02 imposes a tax "on deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction . . ." Is the written agreement by a landowner to sell and convey such lands to a purchaser within the purview of this section? Section 201.08, F. S., imposes a tax "on . . . written obligations to pay money . . . made, executed, delivered, sold, transferred, or assigned in the state. . . ." The usual contract for the sale of land, or an interest therein, is a bilateral one binding the seller, upon the payment of the agreed purchase price, to convey, and binding the purchaser to pay the purchase price (91 C. J. S. 829-830, 840, 872 and 886, §§1, 5, 20, notes 97 and 37; 55 Am. Jur. 900, §509). "From the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor" (*Felt v. Morse*, 80 Fla. 154, 85 So. 656,



text 658). Where a vendee, in a contract for the sale and purchase of real property, obligates himself to pay the purchase price in the usual manner, such obligation is an enforceable one and a written obligation to pay money within the purview of §201.08, F. S.

"The purchaser under a contract (to sell and purchase real property) has an interest which he may sell, in the absence of an agreement otherwise in the contract" (*Marion Mortgage Co. v. Grennan*, 106 Fla. 913, 143 So. 761, text 766). In equity, under such a contract to sell and convey, the purchaser is regarded as the beneficial owner, even though the full purchase price has not been paid (*Miami Bond and Mortgage Co. v. Bell*, 101 Fla. 1291, 133 So. 547, text 548; *Kozacik v. Kozacik*, 157 Fla. 597, 26 So. 2d 659, text 662), and upon the death of the purchaser his interest is usually held to be realty for the purposes of descent and distribution (55 Am. Jur. 787, §360). See also *Atlantic Beach Improvement Corp. v. Hall*, 143 Fla. 778, 197 So. 464, text 466).

A contract for the sale of land operates as an equitable conversion; the vendee's interest under the contract becomes realty and the vendor's interest under the contract constitutes personalty. In equity the purchaser is regarded as the owner subject to liability for the unpaid price and the vendor as holding the legal title in trust for him. It has been said that this is the situation from the time a valid agreement for the purchase of land is entered into. This view of the estate of the purchaser is based on the maxim that "equity regards and treats as done what, in good conscience, ought to be done." In equity a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed. It has also been stated that as a vendee makes payments on a land contract the vendor becomes trustee for him of the legal estate, and he becomes in equity the owner of the land to the extent of payments made . . . (55 Am. Jur. 782-783, §356; see also 91 C. J. S. 1009, et seq., §106).

It has been held in some jurisdictions that the entire equitable title passes at the moment the contract of sale becomes effective, and that the title which the vendor retains is only the naked legal title. In other jurisdictions, however, where a portion of the purchase money is unpaid, the vendor retains a substantial interest in the premises, and both the vendor and vendee are held to have a beneficial interest in the land. Under this view, the vendor has both the legal estate and an equitable or beneficial estate or interest in the land, his beneficial interest being to the extent of the unpaid balance of the purchase price. The vendee's equitable interest or beneficial ownership is to the extent of the payments made by him, and until complete performance, is an interest pro tanto only. His full equitable title matures only on performance on his part of the condition of the contract, such as payment of the purchase money. Under either view, however, the vendor retains the legal title as security for the purchase money, and the purchaser's title and rights are, subject to liability for any unpaid purchase price, and, it has been held, his equitable title is subject to a lien securing the purchase

price as long as it remains unpaid (91 C. J. S. 1014-1015, §106).

In *Larson v. Metcalf*, 201 Iowa 1208, 207 N. W. 382, 45 A. L. R. 1350, it was held that a purchaser under a contract to sell and convey acquired an equitable estate in the lands purchased to the amount of his payments, improvements, etc. From the above and foregoing it seems evident that a contract for the sale and conveyance of real property, signed by both the seller and the purchaser and obligating the owner to sell and the purchaser to pay the purchase price, vests an equitable title, at least to the extent of the payments made, in the realty in the purchaser. This brings us to the question of the application of §201.02, F. S., to instruments granting, assigning, transferring or otherwise conveying to or vesting in the purchaser an *equitable title to real property*.

This office has held, or indicated, that contracts for the sale and conveyance of real property are within the said section, by the following opinions (Oct. 12, 1931, 1931-1932, A. G. O. 840; Feb. 9, 1932, 1931-1932, A. G. O. 912; May 18 and 30, 1949-1950, A. G. O. 256 and 257; and Dec. 6, 1951, 1951-1952, A. G. O. 314), but held adversely in its opinion of Aug. 9, 1948, 1947-1948, A. G. O. 224. The opinions of this office are, therefore, conflicting on the question. Chapter 201, being a taxing statute, should be construed strictly in favor of the person upon whom it is sought to impose the tax (*Rogers v. Sweat*, 113 Fla. 797, 152 So. 432; *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442). Chapter 201, F. S., having been derived from a similar federal statute, must be construed in the light of federal cases construing the federal statute (*Gay v. Inter-County Tel. and Tel. Co.*, Fla., 60 So. 2d 22; *State v. Cook*, 108 Fla. 157, 146 So. 223). Section 201.02, F. S., imposes a documentary stamp tax "on deeds, instruments, or writings, whereby any lands, tenements, or other realty, or *any interest therein*, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser. . . ." The federal statute on the same subject, §4361, title 26, U. S. Code, imposes a documentary stamp tax "on each deed, instrument, or writing, by which any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to or vested in, the purchaser. . . ." It is noted that the Florida statute includes the phrase "*any interest therein*" which is not used in the federal act, and the federal statute includes the word "sold" which is not used in the Florida statute.

By comparing the above mentioned federal and state statutes, we note that the federal tax is imposed on deeds, instruments or writings whereby lands, tenements or other realty is granted, assigned, transferred or otherwise conveyed or vested in the purchaser; while the state statute imposes a state tax on deeds, instruments or writings whereby lands, tenements or other realty, or *any interest therein*, is granted, assigned, transferred or otherwise vested in the purchaser. The federal statute relates to the conveyance of lands, tenements or other realty; the state statute extends to such conveyances of lands, tenements or other realty, but also to any interest therein. The state statute is more inclusive than the federal one. It is a general rule that the term "title" is used in a statute or instrument, in an absence of a clear showing otherwise, in the sense of a *legal title* (*Hoult v. Donahue*, 21 W. Va. 294, text 299; *Thygerson v. Whitbeck*, 5 Utah 406, 16 P. 403, text 404; *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195

S. W. 1139, text 1141). Where realty is *taxable to its owner* the legal title and not the equitable title is intended in the absence of a clear showing otherwise (84 C. J. S. 209, §94). Although we recognize the rule that "if there is any doubt as to the liability of an instrument to taxation under the act, the construction is in favor of the exemption, because a tax cannot be imposed without clear and express words for that purpose" (State v. Cook, 108 Fla. 157, 146 So. 223, text 224) the use of the phrase "any interest therein" may well be taken as "clear and express words" for the taxation of documents conveying any interest in lands, legal or equitable.

Although a contract to sell and convey realty passes an interest in the lands described, at least to the amount of his payments, improvements, etc., to the purchaser (55 Am. Jur. 782-783, §356; 91 C. J. S. 1009, et seq., §106), in the nature of an equitable title, the seller holds a lien upon the lands for the unpaid portion of the purchase price. The usual contract to sell and convey transfers to the purchaser an equitable title, and leaves the legal title in the seller as security for the unpaid portion of the purchase price. The legal title remains in the seller until the purchase price is paid in full. The passing of the equitable title upon the payment of the purchase price and the making of the deed of conveyance passes the complete title to the purchaser; these steps complete a single complete transaction. To impose taxes pursuant to §201.02, F. S., upon both the contract to convey and the deed of conveyance, each upon the full consideration for the transaction, doubtless would be beyond the purpose and intention of the legislature, and would seem to constitute double taxation. The total taxes imposed upon the transaction (the contract of sale and the deed of conveyance) should be measured by the consideration of the completed transaction. The taxes for the completed transaction are to be measured by the full consideration for the transaction; any taxes imposed, under §201.02, F. S., upon the contract of sale as an equitable conveyance, should be taken into consideration when determining the tax upon the deed of conveyance. If the taxes paid on the equitable conveyance are equal to the total tax on the entire transaction, then no taxes would be payable on the deed. Any taxes imposed upon the written obligation to pay money of the purchaser under §201.08, F. S., may not be credited upon the taxes due on the conveyance under §201.02, F. S.

Contracts for the sale and conveyance become subject to taxation when they become binding obligations upon the purchaser and the seller. Where an agreement to convey is subject to a condition precedent, which must be performed before it becomes effective, it is not taxable until it becomes binding upon the parties. To be within this rule the condition must be one upon which the binding effect of the contract depends. The purchaser under the usual contract to sell and convey is bound by his contract, or written obligation, to pay the purchase price (see §201.08, F. S.) and the seller, upon the payment of the purchase price, is obligated to convey the lands (§201.02, F. S.)

The above statutes, authorities, and observations lead to the following conclusions:

1. A written contract or agreement for the sale and conveyance of real property is often of a dual nature:

A. The seller, by his contract or agreement to sell and convey, transfers an equitable title to real property, which is an interest

in the said real property, within the purview of §201.02, F. S., and subject to the documentary stamp tax therein mentioned.

B. The purchaser, by his contract or agreement to purchase, creates a written obligation to pay money, that is, the purchase price, within the purview of §201.08, F. S., which is separate and apart from the obligation of the seller to convey, and, therefore, subject to taxation under said section of the statutes.

The distinction between the two taxes must be kept separate and should not be confused with each other. The two taxes, being separate and distinct, there is no element of double taxation.

2. Although an equitable title passes under the contract or agreement to sell and convey, and the legal title when the deed of conveyance is made, executed and delivered, the statute contemplates the collection of a single tax on the purchase price of the real property. This being true, any tax paid upon the transfer of the equitable title should be credited on the total tax due, when considering the taxes due on the deed of conveyance. Where there is to be no possession under a contract or agreement to sell and convey until the making and delivery of the conveyance of the legal title, no taxes should be imposed upon the transfer of the equitable title; provided, the seller is obligated to convey the legal title as soon as the abstract is delivered, the title is examined, or title insurance is furnished, and the transaction is completed, and there is no unnecessary delay in this connection.

3. The distinction between the written obligation to pay money, of the purchaser, under §201.08, F. S., and the conveyance by the seller, under §201.02, F. S., should be kept in mind and distinguished when imposing taxes on a contract or agreement for the sale and conveyance of real property.

059-245—November 25, 1959

# **CORPORATIONS AND BUSINESS TRUSTS** **STATUS OF AN UNINCORPORATED ASSOCIATION TO** **PRACTICE MEDICINE**

To: *Homer L. Pearson, Secretary-Treasurer, State Board of Medical Examiners, Miami*

## **QUESTION:**

**Is it legal under the laws of Florida to organize an unincorporated association to practice medicine?**

Enclosed was a copy of suggested articles of association for unincorporated associations together with an analysis of same, which were prepared by the law department of the American medical association.

On p. 1 of the said analysis under the heading Comment, I find in the 3rd paragraph, among other things, the following:

The physician's interest in the unincorporated association was stimulated by the possibilities it affords physicians to acquire the "employee" status necessary for participation in pension plans qualified by the internal revenue service for tax deferment.

Under the heading Unincorporated Association on p. 2 of the said analysis is found the following:

In order to acquire status as "employees," some physicians who previously practiced in medical partnerships



have organized themselves into unincorporated associations. The term "corporation" for income tax purposes includes the unincorporated association.

Your attention is called to opinion 055-71 which dealt quite thoroughly with the question of a nonprofit corporation engaging in the private practice of medicine by substituting itself in lieu of the physician in relation to the patient. The opinion held, in substance, that physicians could not legally form a corporation for the practice of medicine in this state.

I do not find any statutes regulating unincorporated associations in the state; therefore, we must turn to the common law on the subject. In *Johnston v. Albritton*, 134 So. 565, our supreme court said:

At common law, unincorporated, voluntary associations organized for business or other purposes were not considered or recognized as having any other character than that of a partnership in whatever it undertook, . . .

In view of the foregoing, it is my opinion that legislation would be necessary to give any legal status other than that of a partnership to an unincorporated association to practice medicine.

Your question is answered accordingly.

059-246—November 25, 1959

**CORPORATIONS AND BUSINESS TRUSTS**  
**CHARTER TAX PAYABLE ON INCREASE IN AUTHORIZED**  
**CAPITAL STOCK BY CORPORATION ORGANIZED UNDER**  
**STATUTE PROVIDING DIFFERENT STOCK TAX SCALE—**  
 §608.05(3) (c), (5) (a), (b), F. S.

To: R. A. Gray, Secretary of State

**QUESTION:**

Where a previously organized Florida corporation paid a charter tax and successive stock increase taxes at a higher rate than is now in effect under current statutes, is said corporation entitled to a tax credit on a new stock increase under the present stock tax statutes? Section 608.05(3) (c), F. S., provides:

(3) The filing tax for a corporation organized under this chapter to conduct a banking, safe deposit, trust, insurance, surety, express, railroad, canal, telegraph, telephone or cemetery company, a building and loan association, mutual fire insurance association, cooperative association, fraternal benefit society, state fair or exposition shall be based upon the authorized capital stock thereof according to the following schedule:

\* \* \*

(c) Twenty-five cents upon each thousand dollars of par value of capital stock in excess of two million dollars. Section 608.05(5) (a) and (b), F. S., provides:

(5) (a) The amount of fees and filing taxes to be collected by the secretary of state before he shall approve any amendment or merger or consolidation agreement increasing authorized capital stock shall be equal to the fees and filing taxes required for an original certificate of incorporation authorizing the total capital stock to be out-

standing after the amendment or consolidation or merger agreement, except that all filing taxes paid *with respect to shares authorized* prior to such amendment or agreement, and which are actually included in authorized capital existing at the time of increase, shall be deducted.

(b) The fee for filing a certificate of dissolution or an amendment of a certificate of incorporation or a merger or consolidation agreement which does not increase the authorized capital stock shall be ten dollars. (Emphasis supplied.)

It is a cardinal rule of statutory construction to ascertain the legislative intent in construing the respective acts of the legislature. *Ervin V. Peninsular Tel. Co.*, Fla., 53 So. 2d 647; *Smith v. Ryan*, 39 So. 2d 281. Furthermore, it is the duty of the courts in construing statutes to give the language therein its plain and obvious meaning and to avoid absurd interpretations (*Johnson v. State*, Fla., 91 So. 2d 185; *Foley v. State ex rel Gordon*, Fla., 50 So. 2d 179; *Clark v. Kreidt*, 145 Fla. 1, 199 So. 333). In addition, words of common usage when used in a statute should be construed with plain and ordinary significance (*Pederson v. Green*, Fla., 105 So. 2d 1; *Gasson v. Gay*, Fla., 49 So. 2d 525).

The language in §608.05(5) (a), F. S., quoted above, appears susceptible to but one logical construction, this being that the legislature intended that every corporation desiring to increase the amount of its corporate stock should pay a tax on the amount of the additional shares authorized, or putting it another way, an established corporation is not required to pay a stock tax on all shares authorized but only on the additional shares authorized under a new stock increase. The tax imposed is "*with respect to the shares authorized*" and is in no way dependent upon the previous rate of tax per share under statutes in effect prior to the initiation of the current stock increase.

While there is a prohibition against the impairment of contract rights with existing corporations and said corporations generally continue to exist under the laws in effect at the time of their organization (Introduction to the Statutory Corporation Law of Florida, by Floyd A. Wright, 18 F. S. A. 51, at 52; *Matlack Props. v. Citizens and So. Nat. Bank*, 120 Fla. 77, 162 So. 148), no contract obligation is alleged herein for if it were the managers of the corporation involved would be faced with a higher tax than is now sought by the state under the present statutes. A state does, however, have the power to increase the charges imposed for increasing capital stock of domestic corporations over that prescribed by law at the time the corporation was formed (*Pacific Gas and Elec. Co. v. State*, 214 Calif. 369, 6 P. 2d 57; *Fletcher Cyclopedic Corp.*, Vol. 11, §5132). Likewise, a state has the authority to reduce the charges imposed on corporations for increasing capital stock but in so doing it does not obligate itself to give any tax refunds to corporations acting under prior laws nor is the state obligated to give a tax credit on subsequent stock increases under amended statutes authorizing a rate reduction. To do so in the instant situation would be illogical since under this theory a corporation merely amending its certificate of incorporation in a manner so as not to increase its authorized capital stock would be required to pay a fee of \$10 under the provisions of §608.05(5) (b) quoted above but the same corporation might by

adding one share of authorized capital stock place itself in a position to request a tax refund or tax credit if it had initially organized under a statute providing a less favorable tax scale. Needless to say, the legislature could not have intended such undesirable consequences and interpretations which result in unreasonable and absurd conclusions are frowned upon (*Maryland Cas. Co. v. Marshall, Fla.*, 102 So. 2d 212, *Johnson v. State*, supra).

In the instant situation there appears to be no statutory authority for the grant of a tax credit or refund and indications from at least one other jurisdiction suggests that tax credits against capital stock increase fees and taxes have been refused (*Montgomery Ward and Co. v. Stratton*, 342 Ill. 472, 174 N. E. 547).

It is our opinion that what is actually intended by the statute is that those outstanding shares which are included in the authorized capital by merger or consolidation shall not be taxed anew; that deduction therefor shall be made so that such outstanding shares or their equivalent in the newly authorized capital stock shall go untaxed, but all additional or new capital stock shall be taxed.

On the basis of the facts and authorities set out herein, your question as set out above is answered in the negative.

059-247—November 25, 1959

(Superseded as to 4th question by 060-121.)

#### INSURANCE

EFFECT OF §§624.0305 AND 624.0318, F. S. (§§79 AND 92, CH. 59-205, INSURANCE CODE) ON MUNICIPAL OCCUPATIONAL LICENSE TAXES

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

#### QUESTIONS:

1. May a municipality impose occupational license taxes on insurers, their agents or representatives:

(a) Where such tax is measured by volume of business within the boundaries of a municipality?

(b) Where such tax is measured by the number of agents authorized to represent an insurer within the boundaries of a municipality?

2. If question 1.(a) and (b) is answered in the negative, may municipalities exact an occupational license tax from insurers, their agents or representatives, under the provisions of their charters or local laws or Ch. 205, F. S.?

3. May a municipality impose an occupational license tax on insurance agents, solicitors, adjusters or representatives of an insurer?

4. Are municipalities and other political subdivisions precluded from exacting occupational license taxes conditioned upon the insurer transacting business within the boundaries of said municipality or other political subdivision?

Sections 79 and 92 of Ch. 59-205, the new Florida insurance code, effective Oct. 1, 1959, provide as follows:

#### §79. *Municipal license tax*

Municipal corporations may require a license tax of insurance agents and solicitors not to exceed fifty per cent

of the state license tax specified as to such agents and solicitors under this chapter, and unless otherwise authorized by law. Such a tax may be required only by a municipal corporation within the boundaries of which is located the agent's business office, or if no such office is required under this Code, by the municipal corporation of the agent's place of residence.

§92. *Preemption by state*

(1) The state of Florida hereby preempts the field of imposing excise, privilege, franchise, income, license, permit, registration and similar taxes, licenses and fees upon insurers and their agents and other representatives as such, as measured by premiums, income, or volume of transactions or in any other similar manner; and no county, city, municipality, district, school district or other political subdivision or agency in this state shall levy upon insurers, or upon their agents and representatives as such, any such tax, license or fee so measured additional to such as are levied by the legislature of Florida in this code; nor shall any such county, city, municipality, district, school district, or political subdivision or agency require of any such insurer, agent or representative, duly authorized or licensed as such under this code, any additional authorization, license, or permit of any kind for conducting therein transactions otherwise lawful under the authority or license granted under this code.

(2) This section shall not be deemed to prohibit taxes on real and tangible personal property located in this state, the municipal license taxes upon agents and solicitors authorized under section 79 of this code, or the collection of taxes incurred because of operations prior to the effective date of this code.

Section 92(1), Ch. 59-205, consists of three separate clauses. The first clause preempts, in favor of the state, levying or imposing taxes, licenses or fees on insurers or their agents and other representatives "measured by premiums, income, or volume of transactions or in any other similar manner; . . ."

The second clause expressly prohibits counties, cities, municipalities, districts, school districts or other political subdivisions or agencies in this state, from exacting any such tax, license or fee so measured in addition to those as are levied by the legislature in the insurance code.

The third clause of said section expressly prohibits counties, cities, municipalities, districts, school districts, political subdivisions or state agencies from requiring of any insurers, agent or representatives duly licensed or authorized as such under the code, any additional authorization, license or permit of any kind for conducting therein transactions otherwise lawful under the authority or license granted under this code.

Your inquiry, together with many received from municipalities, reveals what appears to be ambiguity in the following phrases, of §92, Ch. 59-205: "or in any other similar manner," as appears in clause 1 of said section and "any additional authorization," as appears in clause 3 of said section.

"The Legislature may also provide for levying a special capitation tax, and a tax on licenses." (§5, Art. IX, State Const.). Thus



the legislature has plenary power in the field of license or excise taxation although the taxing power may be exerted for regulation or revenue, or both, (*Jerome H. Sheip Co. v. Amos*, 100 Fla. 863, 130 So. 699), the power to tax, exempt from taxation, remit taxes wrongfully collected, or to compromise taxes, may be delegated to municipalities, but none of those powers is inherent therein (*St. Lucie Estates v. Ashley*, 105 Fla. 534, 141 So. 738).

In imposing a license or occupational tax the only limitation on statutes is that persons may not be deprived of property without due process of law or denied equal protection of laws (*Hiers v. Mitchell*, 95 Fla. 345, 116 So. 81). It has also been held that excise taxes will be upheld if reasonable and not unjustly discriminatory, arbitrary, whimsical, irrational, grossly oppressive, plainly unequal or contrary to common rights (*Gray v. Central Florida Lumber Co.*, 104 Fla. 446, 140 So. 320. *Certiorari denied*, 53 Supreme Court 84, 287 U. S. 634, 77 L. Ed. 549).

Under §5, Art. IX, State Const., a statute may authorize a municipality to impose by ordinance license taxes although such statute and the ordinances adopted under it and the licenses imposed may be inconsistent with other statutes covering this particular subject (*City of Jacksonville v. Bowen*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 B, 1913 Ann. Cases 1915 D 99). However, in the imposition of excise taxes, there must be geographic uniformity throughout the taxing district in which the tax applies (*Amos v. Matthews*, 99 Fla. 1, 65, 115, 126 So. 308).

It is also well settled in this state that the legislative intent is the guide in the construction of statutes, notwithstanding it may appear to contradict the strict letter of the statute, and no literal interpretation should be given that leads to an unreasonable conclusion or purpose not designated by the legislature. State ex rel *Hughes v. Wentworth*, 135 Fla. 565, 185 So. 357, and statutes will be interpreted so as to avoid objectionable consequences (*Simmons v. State*, 160 Fla. 626, 36 So. 2d 207).

The history, evil to be corrected, intention of the legislature, the subject to be regulated, and the objects to be obtained are to be considered in construing a statute even though the legislative intent so determined may apparently contradict the strict letter of the statute (*Singleton v. Larson*, 46 So. 2d 186).

The meaning of words or phrases must be determined from the purpose for which the statute was enacted (*Peninsular Industrial Ins. Co. v. State*, 61 Fla. 376, 55 So. 398).

Section 92(1), Ch. 59-205, deals with two distinct types of excise taxation. The first two clauses have to do with revenue-type occupational taxes measured by dollar volume of business done by insurers, their agents or representatives. The third clause of said section deals with license taxes regulatory in nature. Although this distinction is not easily discernible, it perhaps can best be pointed out by the following examples:

An occupational tax charged by municipalities against insurance agents as a class *not* measured by the volume of business of said agents, would appear to be valid if such occupational tax is specifically authorized by the municipality's charter or ordinances enacted under authority of Ch. 205, F. S., or enacted under the provisions of §79, Ch. 59-205.

Any type of local license taxation intended to regulate the conduct of the insurance business, as such, i.e., a tax similar to the

one imposed by the state on insurers, their agents or representatives, payable to the insurance commissioner in connection with an examination or some other qualifying requirements, is unquestionably prohibited by clause 3, regardless of method of determining the amount of such tax.

Under the provisions of §92, Ch. 59-205, municipalities and other political subdivisions of the state are no longer authorized to exact revenue occupational license taxes where such taxes are measured by dollar volume of business within said subdivision, nor may municipalities exact a regulatory license tax from insurers, their agents or representatives under said section.

Section 79, supra, Ch. 59-205, permits municipal corporations to require a license tax not to exceed 50% of the state license tax, unless otherwise authorized by law, and further provides that "such a tax may be required only by a municipal corporation within the boundaries of which is located the agent's business office, or if no such office is required under this code, by the municipal corporation of the agent's place of business. Thus, the authority of municipal corporations to require license taxes of insurance agents and solicitors is limited to an amount of 50% of the state license tax on such persons unless otherwise provided by the municipality's charter, special or local act of the legislature, or resolution under authority of Ch. 205, F. S. Any such tax is subject to the further limitation that a municipality may only require such license tax where the agent's place of business is located within the boundaries thereof, or in the event the agent is not required to maintain an office, by the municipality in which the agent resides. This section prohibits municipalities from charging a license tax on insurance agents or solicitors where said persons neither maintain an office nor reside within the municipal boundaries.

In view of the above statutory provisions and authorities, it is my opinion that the questions presented should be answered as follows:

1. (a) A municipality is no longer authorized to impose occupational license taxes on insurers, their agents or representatives where such tax is measured by volume of business within the boundaries of a municipality.

1. (b) Municipalities are authorized to impose an occupational tax on insurers based upon the number of agents authorized to represent an insurer within the boundaries of the municipality, where permitted by charter or local act.

2. Municipalities may exact an occupational license tax from insurers, their agents or representatives under the provisions of their charters or local laws or Ch. 205, F. S., and in the absence of any other statutory provision such occupational licenses may be imposed under the provisions of §79, Ch. 59-205.

3. A municipality may impose occupational license taxes on insurance agents, solicitors, adjusters or representatives of an insurer so long as such persons conduct their insurance business from an office located within the boundaries of a taxing municipality or such persons are residents of said municipalities, such tax to be subject to the limitations expressed throughout this opinion.

4. Municipalities and other political subdivisions are precluded from exacting occupational license taxes conditioned upon the insurer transacting business within the boundaries of said municipality or other political subdivision. (Superseded by A. G. O. 060-121.)

The above comments are my views on the questions presented by your inquiry. I do believe, however, that in view of the magnitude of this problem, both to the political subdivisions of this state and to the insurance industry operating in this state, construction of §§92 and 79, Ch. 59-205, the new Florida insurance code, should be sought by interested parties bringing them before a court of competent jurisdiction for consideration.

059-248—November 30, 1959

#### STATE FIRE MARSHAL

1958 EDITION OF FLORIDA FIRE PREVENTION CODE—  
WHERE AND BY WHOM ENFORCEABLE—§§633.13-  
633.16 AND 633.11, F. S.

To: J. Edwin Larson, State Fire Marshal, Tallahassee

#### QUESTIONS:

1. Are the provisions of the 1958 edition of the Florida fire prevention code in effect within the boundaries of corporate municipalities?

2. Does the chief of a municipal fire department have authority to enforce the Florida fire prevention code in the same manner as a state deputy fire marshal?

3. Are constables and deputy sheriffs authorized to secure evidence of violations of the Florida fire prevention code and to cause prosecution to be instituted under the provisions of Ch. 633, F. S.?

4. Can any person secure evidence of the breach of the Florida fire prevention code and bring prosecution for such offense under the state fire marshal act in the name of the state fire marshal?

#### AS TO QUESTION 1:

The Florida fire prevention code is a regulation of the state fire marshal, promulgated under the authority of Ch. 633, F. S. Section 633.15 thereof provides as follows:

This law, and all regulations prescribed by the state fire marshal hereunder, shall have the same force and effect in each and every incorporated town or city, as the ordinances of such respective municipalities, and shall be enforceable in the municipal courts in the same manner as such ordinances.

The above statutory language contemplates that the Florida fire prevention code shall be operative within municipal corporate limits in the same manner as ordinances of the respective municipalities. Unquestionably the authority of the state fire marshal runs throughout the state and rules and regulations of said officer are effective not only within corporate municipal limits but throughout the entire state as well. Question 1 is answered in the affirmative.

#### AS TO QUESTION 2:

Chiefs of municipal fire departments shall be *ex officio deputy fire marshals* (§633.11, F. S.). The state fire marshal and his deputies shall have the same authority to serve summonses, make arrests, carry firearms and make searches and seizures as the sheriff or his deputies (§633.14, F. S.).

The authority given the state fire marshal under this law may

be exercised by him or his deputies either individually or in conjunction with any other state or local official charged with similar responsibilities (§633.13, F. S.).

The foregoing sections of the Florida Statutes provide ample authority for the chief of a municipal fire department to enforce the Florida fire prevention code. Question 2 is answered in the affirmative.

**AS TO QUESTION 3:**

Although the state fire marshal and his deputies are given the authority to serve summonses, make arrests, carry firearms and make searches and seizures, in the same manner as the sheriff or his deputies (§633.14, F. S.), there is no provision in Ch. 633 which authorizes constables and sheriffs or deputy sheriffs to conduct the hearings and investigations authorized by said chapter.

I believe that although sheriffs, deputy sheriffs and constables do not have a specific duty to enforce the provisions of the Florida fire prevention code, violations of which are misdemeanors under the provisions of §633.16, F. S., such officers would be authorized as general peace officers of the county to make arrests and cause prosecution to be entered under said section where violations of the Florida fire prevention code came to their attention. Question 3 is answered accordingly.

**AS TO QUESTION 4:**

Examination of Ch. 633, F. S., fails to reveal any provision whereby persons other than the state fire marshal, his deputies or employees designated by him for such purposes, the chiefs of fire departments and the mayors of municipalities having no organized fire department, may bring action under said chapter. Thus, the power of enforcement of the Florida fire prevention code appears to lie solely within the jurisdiction of the state fire marshal's office, chiefs of fire departments, mayors of municipalities having no organized fire departments, and as pointed out in the answer to question 3, sheriffs, deputy sheriffs and constables. Of course, private persons discovering violations of the Florida fire prevention code would, as in connection with other crimes, be authorized to present an affidavit upon which a judicial officer might issue an arrest warrant for the violator.

Private persons, having no duty to enforce the Florida fire prevention code, might be subject to actions of trespass if they attempt to conduct investigations on the property of others. It is therefore suggested that violations of said code, sought to be prosecuted by private persons, should be brought to the attention of a judicial officer or other officer empowered to enforce the Florida fire prevention code.

Question 4 is answered accordingly.

059-249—November 30, 1959

**BANKS AND BANKING**

**RELEASE OF NAMES OF CREDIT UNION'S SHAREHOLDERS  
AND SHARES OWNED, ETC.—CH. 657; §§657.01, 657.02,  
657.05, 657.06, 657.08 AND 119.01, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTIONS:**

1. May the state comptroller release a credit union's



list of shareholders and the amount of shares held by each?

2. If the answer to question 1 is in the negative, then may the credit union or the bonding company bonding the officers and employees of the credit union, release such lists?

Credit unions are creatures of Ch. 657, F. S., which chapter is administered by the state comptroller. Persons desiring to organize a credit union must apply to the state comptroller for permission to organize such a union. The application certificate must be executed in duplicate, furnishing the information required by §657.01, F. S., to which reference is made, including the name and location of the union, the names and addresses of subscribers and number of shares subscribed by each subscriber, the par value of such shares, together with a copy of the by-laws proposed. If the application and the information therein contained, with other information furnished, show that it complies with the requirement of the statutes, then a credit union may be organized (§657.01, F. S.). Such a certificate of organization may be amended (§657.02, F. S.). The membership of such credit unions consists of its subscribers and others who may elect to become members and who qualify for membership (§657.05, F. S.). However, there is no requirement that a list of such subsequent members be filed with the state comptroller so as to become a public record so as to be within the purview of §119.01, F. S., hereinafter mentioned.

Under §657.06, F. S., "credit unions shall be under the supervision of the state comptroller. They shall report to him at least annually on or before the 31st day of January on blanks supplied by the said comptroller for that purpose. Additional reports may be required. For failure to file when due, unless excused for cause, the credit union shall pay the treasurer of the state five dollars for each day of its delinquency. If the said comptroller determines that the credit union is *violating the provisions of this chapter, or is insolvent*, the said comptroller may serve notice on the credit union of his intention to revoke the certificate of approval. If, for a period of fifteen days after said notice, said violation continues, the said comptroller may revoke said certificate and take possession of the business and property of said credit union, and maintain possession until such time as he shall permit it to continue business, or its affairs are finally liquidated, in the same manner as state banks are liquidated. He may take similar action if said report remains in arrears more than fifteen days." Also, under said section it is provided: "Credit unions shall be *examined at least annually* by the said comptroller or his agent except that if a credit union has assets of less than twenty-five thousand dollars, he may accept the audit of a practicing public accountant in place of such examination." (Emphasis supplied.) Whenever the state comptroller finds that a credit union is violating the provisions of Ch. 657, F. S., or is insolvent, in any of the manners aforesaid, it becomes his official duty to take steps to correct such violation and prevent insolvency, if insolvency may be avoided. Where violations of criminal laws are disclosed by the audit the state attorney should be advised and furnished material information relative to such violations.

Under §119.01, F. S., "all state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen." "What is a public record is a question of law. A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done" (*Amos v. Gunn*, 84 Fla. 285, 94 So. 615, text 634). The mere fact that a document is deposited or filed in a public office, or with a public officer, even though necessarily so deposited, or is in custody of a public officer, does not make it a public record. Nor is every memorandum made by a public officer a public record; papers or memoranda in the possession of public officers which are not required by law to be kept by them as public records, are not public records, and reports of private individuals to government officials, even pursuant to statute, correspondence of officials relating to private affairs, although in connection with public business, and memoranda of public officers made for their own convenience, even if made at public expense, are not public records unless made so by statute. Whether or not records are strictly public records is often declared by statute. In the absence of statute, the nature and purpose of the record and possibly custom and usage, must be the guides in determining the class to which it belongs (76 C. J. S. 113, §1). If the state comptroller has a list of the credit union's shareholders and the amount of shares held by them, doubtless they are memoranda taken from the books and records of the union in connection with an audit of its business made for the purpose of determining its solvency and whether the applicable statutes have been violated. Such memoranda are not required by the statutes and do not usually constitute a public record. There is nothing in Ch. 657, F. S., which indicates that a list of the credit union's shareholders and the amount of shares held by them must be filed with the state comptroller and kept by him as a public record open to public inspection.

The list of shareholders, and the amounts of credit union shares held by them, is a list of individuals and their property and property rights. This raises a question of right of privacy of such shareholders. "The right of privacy," as the term is employed with respect to the determination of whether a cause of action in damages exists for an unwarranted invasion of such right . . . may be defined as the right of an individual to be let alone, or to live a life of seclusion, or to be free from unwarranted publicity, or to be free from unwarranted interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." (77 C. J. S. 396-7, §1). The right of privacy has been recognized and enforced by the supreme court of this state (*Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, 168 A. L. R. 430, and 159 Fla. 31, 30 So. 2d 635). Generally, upon the question of the right of privacy, see annotations in 138 A. L. R. 22-110, 168 A. L. R. 446-467, and 14 A. L. R. 750-774.

The right of privacy is not an absolute right and is subject to limitations, such as the dissemination of news and news events

under certain conditions. It protects only the ordinary sensibilities of an individual and not supersensitiveness. It has been said that *generally* the right does not exist with respect to the dissemination of news and news events, or educational information, and does not prohibit the communication of any matter, even though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the rule with respect to slander and libel (77 C. J. S. 399-400, §2). However, this authority further states that "in any event, the right of privacy must be recognized and enforced without curtailment of constitutional guarantees."

Although it may be that a newspaper publication of a list of the shareholders and the amount of shares held by each in a credit union may have news value, there exists the question of whether the furnishing of such information to the publisher of a newspaper by a state official might not constitute a violation of the right of privacy of some, if not all, of such shareholders; this is a question that only the court in each particular case can determine.

This office in opinions of March 22, 1957 (057-82, 1957-58 A. G. O. 88) and of May 9, 1958 (058-156, 1957-58 A. G. O. 680) considered the right of the comptroller to reveal information concerning correspondence, reports, letters, records, and the like, obtained, received or used in connection with the enforcement of the small loan and sales and use tax statutes, wherein it was held that such information was not public records and was in the nature of state secrets which should not be revealed. Much of the information obtained by the comptroller in his investigations concerning credit unions is of the same general nature. If a list of credit union members and their number or value of shares in the credit union may be obtained and handed over to the press by the comptroller, the question immediately arises as to why the same rule should not apply to bank stockholders, bank depositors, members of building and loan associations or any other corporation or agency whose books and records are liable to inspection by the state comptroller. We do not think that the statutes and laws of this state would permit such disclosures without the consent of the interested parties.

These authorities and observations require a negative answer to question 1 unless and until a court of competent jurisdiction shall hold otherwise.

However, we see no objection to your allowing public inspection by, or furnishing information to citizens of the state covering any of the organizational records relating to a credit union since they are public records. These are the items referred to in §657.01, F. S., which include the names and addresses of subscribers to the original certificate of a credit union and all other original organization documents and amendments thereto. The record of the names and addresses of the members of the board of directors and committees and officers which are filed with the comptroller pursuant to §657.08, F. S., are also public records and may be disclosed to citizens.

The answer to question 2 is in the affirmative insofar as the credit union is concerned. However, whether the bond company bonding the officers may release the list of shareholders is a question which only the bonding company, on advice of its counsel, can properly answer. Actually, this question involves a matter of pri-

vate consent rather than a subject of state concern. Nevertheless, I see no legal objection to the credit union releasing the list if it will do so.

059-250—December 4, 1959

#### MUNICIPAL COURTS

JURISDICTION TO TRY PERSONS ACCUSED OF VIOLATING PROVISIONS OF FLORIDA MODEL TRAFFIC ORDINANCE, CH. 186, F. S.—PROCEDURES—§§186.50-186.52 AND 186.56, F. S.

To: *Raymond A. Doumar, Municipal Court Judge, Fort Lauderdale*  
QUESTIONS:

1. Can the municipal court acquire jurisdiction over the subject matter of an offense where the complaint is in the form of a citation which is not sworn to by the arresting officer?

2. Does a person against whom an unsworn citation has been filed in the municipal court waive his right to a formal sworn complaint against him by the entry of a plea of guilty or not guilty to such citation?

Generally, the phrase "jurisdiction of the subject matter" has reference to the power of a court to hear and determine a particular cause. Although this phrase may have sometimes been extended to situations where the jurisdiction of the court has not been properly invoked by appropriate pleadings prepared and filed in accordance with law, such an application is not proper (*Malone v. Meres*, 109 So. 677; 8 Fla. Jur. Courts, §97; *Bohlinger v. Higginbotham*, Fla., 70 So. 2d 911).

In view of the above, it would appear that whether the municipal court had jurisdiction over the subject matter of an offense would depend upon the provisions of the constitution of Florida, Florida Statutes, and the municipal ordinances of the municipality where the particular municipal court is located, applicable to said court, rather than upon the form of the citation or complaint filed in such court.

It is well settled that a municipal court has authority to try only causes which arise under municipal ordinances which have been duly adopted by the municipality where the court is located pursuant to authority granted such municipality under either Florida Statutes or a special act of the legislature.

Your letter indicates that you are primarily concerned with the jurisdiction of the municipal court to try persons accused of violating the provisions of the Florida model traffic ordinance (Ch. 186, F. S.).

If the city of Fort Lauderdale has adopted the Florida model traffic ordinance as an ordinance of that city, and has provided either in the ordinance adopting the Florida model traffic ordinance or some other general ordinance dealing with the powers of the municipal court that violations of the Florida model traffic ordinance shall be prosecuted in the municipal court, then such court would have jurisdiction over the subject matter of violations of said ordinance.

The jurisdiction of a particular court over the subject matter of a particular cause remains at rest until called into action by a



pleading and process prescribed or recognized by law (*Krivitsky v. Nye*, 19 So. 2d 563).

The procedures established by Ch. 186, F. S., to invoke the jurisdiction of the municipal court over the subject matter of violations of said chapter, if it has been adopted as a municipal ordinance and power to try violators thereof invested in the municipal court as described above, is outlined below. It should be noted, however, that some of the requirements imposed by Ch. 186, F. S., might be modified or expanded by proper provisions contained in the ordinances of the city of Fort Lauderdale.

Section 186.50, F. S., provides that the municipality is to provide forms in triplicate to be used in notifying violators to appear and answer charges of violating the Florida model traffic ordinance.

Except where the arrest is on a charge of driving while under the influence of intoxicating liquor or narcotic drugs or reckless driving or where it appears doubtful that the accused would appear pursuant to a written citation, any police officer making an arrest for violation of the Florida model traffic ordinance shall issue a written citation provided pursuant to §186.50, *supra*, to the accused, and upon receiving the written promise of the accused to appear at the required time, shall release the accused from custody. There is no provision which would require that the citation be sworn to (§186.51, F. S.).

Section 186.52, F. S., provides that the violation of the written promise to appear obtained as described above shall constitute a violation of the Florida model traffic ordinance.

Furthermore, upon the failure of a person to comply with a notice to appear, the municipal clerk or the clerk of the traffic violations bureau is required to issue a warrant for the arrest of such person (§186.56, F. S.). There is nothing in Ch. 186, F. S., which would require that the arresting officer must swear to the truth and accuracy of the citation prior to a warrant being issued thereon although it may well be better practice to have such action taken.

That procedures such as those discussed above may be adopted to regulate the procedure in municipal courts does not appear in question. In the case of *Wright v. Worth*, 91 So. 87, the supreme court of Florida said:

(1) The Constitution contains no express limitations upon the power of the Legislature to prescribe the procedure for municipal courts. Under section 20, art 3, special laws may be enacted "regulating the practice" of municipal courts.

(2, 3) Indictments are not required or permitted in municipal courts. Due process of law requires that a person charged with an "offense" against a municipal ordinance shall be duly advised of the nature and cause of the accusation against him and have reasonable opportunity to conserve his defense, whether by securing witnesses or otherwise, and have it presented to and considered by the court before rendering judgment in the cause.

(4, 5) The statute expressly requires the docket of the offense to be "sufficient to put the accused upon notice of the offense with which he is charged." This is sufficient to afford due process of law as to the charge if it is complied with. The petition shows the docket entry to be:

"No. 47018. Name and complaint, Mamie Wright, having liquor in her possession in violation of section 18a."

Considering the nature of trials in municipal courts, this charge appears to be sufficient as a compliance with the statute as to the charge, and to afford due process of law, at least in the absence of some showing that advantage was taken of the accused in making and prosecuting the charge.

In the case of *Sloan v. Hutchingson*, 163 So. 61, the supreme court of Florida said:

(8) The general rule is that in the absence of special statutory authority to try a municipal offender solely on a police blotter entry accusation alone, that no such procedure in a municipal court is warranted, especially if the accused object. See *Wright v. Worth*, 83 Fla. 204, 91 So. 87.

(9, 10) But a motion to dismiss or quash proceedings attempted without legal sanction of an accusation under oath, or its prescribed statutory equivalent in the form of a police blotter entry in a municipal court record where the latter course of procedure has been expressly authorized, is the appropriate means to pursue as a method of presenting the point which, if denied, can be availed of on motion in arrest of judgment, or even on habeas corpus after an attempted judgment and condemnation to imprisonment has been actually entered and is about to be executed in contravention of that essential requirement of law that enjoins upon municipal, as well as other, courts, the adherence to such forms of accusation as are indispensable for the support of an adverse judgment against one attempted to be imprisoned thereunder.

Although Ch. 186, F. S., does not contain a provision expressly so providing, it seems that §§186.50, 186.51 and 186.52, contemplate that a trial of the charges contained in the citation would be based on the citation without any "formal sworn complaint" being required, therefore, it does not appear that any person to whom an unsworn citation has been properly issued has any right to be charged by a "formal sworn complaint."

It would seem to me that the unsworn citation furnished the accused pursuant to Ch. 186, F. S., or more properly the ordinance of the municipality adopting the provisions of Ch. 186, F. S., as a municipal ordinance, would be sufficient to advise a person of the nature of the accusation against him and to afford him a reasonable opportunity to prepare his defense to such accusation.

Your questions are answered as indicated above.

059-251—December 4, 1959

#### HIGHWAYS, BRIDGES AND FERRIES

#### CLOSING OF COUNTY ROAD BY STATE ROAD DEPARTMENT—§§338.01, 338.02, 334.02(8) AND 335.03, F. S.

To: *Thomas D. Oakley, Assistant County Attorney, Duval County, Jacksonville*

#### QUESTION:

May the state road department close county roads

which would intersect limited access facilities at grade without participation of the county in such closing?

It appears from the statements in your letter and the enclosures that the state road department has passed a resolution closing certain county roads which would intersect proposed interstate highway 8.

The authority for the state road department to eliminate such intersections can be found in §338.02, F. S.

... (1) The highway authority of the state, county, city, town, or village may designate and establish limited access highways as new and additional facilities or may designate and establish an existing street or highway as included within a limited access facility.

(2) The state ... *shall have authority to provide for the elimination of intersections at grade of limited access facilities* with existing state and county roads, and city and town or village streets, by grade separation or service road, or by closing of such roads and streets at the right-of-way boundary line of such limited access facility; and after the establishment of any limited access facility no highway or street which is not part of said facility shall intersect the same at grade. No city, town, or village street, county or state highway or other public way shall be opened into or connected with any such limited access facility without the consent and previous approval of the highway authority in the state, ... having jurisdiction over such limited access facility. Such consent and approval shall be given only if the public interest shall be served thereby. (Emphasis supplied.)

The proposed interstate highway 8 is a "limited access facility" as defined by §334.02 (8), F. S., and as referred to in §338.02, *supra*. The roads that the state road department has resolved to close are not "limited access facilities," requiring joint action by the county and the state in vacating limited access facilities under the provisions of §338.01 (2), F. S. Therefore, the provisions of §338.01 (2), F. S., requiring joint action are inapplicable to the instant situation where the state road department is *not* eliminating a limited access facility but rather is eliminating roads which would intersect at the right-of-way boundary line of a new limited access facility.

It should be pointed out that the program of development of interstate highways is a matter solely within the jurisdiction of the state road board. The effectiveness of such program is dependent upon the efficient operation of said board. The provisions of §335.03, F. S., confer upon the state road board the power and authority to make rules and regulations concerning the planning and construction of the federal interstate highways in Florida as well as authorizing said board to take full advantage of the federal highway act of 1956 and amendments thereto. Under the provisions of the federal highway act, relating to federal-state agreements for the construction of interstate highway projects, points of access or exit from interstate projects must be approved by the secretary of commerce (23 U. S. C. A., Highways, §111, pp. 16, 17.) By virtue of this provision and the grant of power and authority under §335.03, *supra*, and §338.02, *supra*, I am of the opinion that the state road department can properly close certain roads intersecting

interstate highway 8 without county participation in such action and thus assure efficient, expeditious and economical construction of the interstate highways in this state.

Your question is answered in the affirmative.

059-252—December 4, 1959

**REGULATION OF TRADE, COMMERCE & INVESTMENTS  
SALE OF LIQUID FUELS—COLLECTION OF LICENSE FEES  
FROM LIQUEFIED PETROLEUM GAS DEALERS UNDER  
§526.13, F. S.—§§526.12, 526.14 AND 95.021; CH. 526, F. S.**

To: J. Edwin Larson, State Treasurer, Tallahassee

**QUESTIONS:**

1. Is a person or firm presently engaged in the liquefied petroleum gas business as defined in §526.12, F. S., liable for payment of the license fees under §526.12 for the years in which he actively engaged in said business without paying the appropriate fee and obtaining the required license?

2. If the answer to question 1 is in the affirmative, how many years prior to the current licensing year is said person or firm subject to such license fee?

**AS TO QUESTION 1:**

Section 526.13, F. S., relating to licensing and fees, provides:

(1) It shall be unlawful for any person to engage, in this state, in the business of . . . liquefied petroleum gas, . . . as defined in §526.12, without first obtaining from the state fire marshal a license to engage in one or more of these businesses, which license shall be granted to any applicant who files . . . sufficient bond . . . , and pays for such license the following fees. . . .

According to the provisions of §526.14, F. S., the licenses hereinabove referred to are required to be renewed annually. It would appear, then, that any person or firm engaged in the liquefied petroleum gas business without having paid the yearly license fees would be liable for the payment of said license fees under §526.13, F. S., for the years in which he was actively engaged in said business.

In addition, I point out that:

An action to enforce collection of the license tax cannot be brought until the expiration of the time provided by the statute, but, unless otherwise provided by statute, *lapse of time does not bar an action to recover the license or occupation tax.* (Emphasis supplied.) (53 C. J. S., Licenses, §53 e., p. 688.)

Question 1 is therefore answered in the affirmative.

**AS TO QUESTION 2:**

Examination of Ch. 526, F. S., and particularly §526.13 fails to reveal any specific limitation as to the number of years for which unpaid license fees may be collected by the state. The only apparent limitation is set forth in §95.021, F. S., wherein a civil action is barred if not commenced by the state within 20 years.

It is my opinion that the state fire marshal is authorized to collect unpaid license fees from persons or firms engaged in the liquefied petroleum gas business for all prior years during which



said persons or firms actively engaged in said business.  
Question 2 is answered accordingly.

059-253—December 4, 1959

### COURTS

JURISDICTION OF SMALL CLAIMS COURT OF LEON COUNTY—CH. 59-622—CHS. 76-78, 83 AND 86; §§42.03, 42.11, 76.03, 77.01, 78.03, 78.05, 86.05 AND 86.06, F. S.

To: William F. Daniel, Judge, Small Claims Court, Tallahassee

### QUESTION:

Does the small claims court of Leon county, established under the provisions of Ch. 59-622 have jurisdiction in cases involving:

1. The enforcement of a statutory lien under Ch. 86, F. S.?
2. An action for replevin under Ch. 78, F. S.?
3. An action for garnishment under Ch. 77, F. S.?
4. An action for attachment under Ch. 76, F. S.?
5. An action for distress rent under Ch. 83, F. S.?

In your letter you discuss briefly the history of your court (the small claims court of Leon county) and point out that "In the Act which established the forerunner of our present court, the use of the special writs was expressly prohibited; when the new Act was prepared for introduction in the 1959 Legislative session, language expressly authorizing the use of the special writs and suits to enforce statutory liens was used and a separate filing fee was provided. However, all of this language was deleted prior to introduction of the bill at the request of the local Legislative delegation. The express purpose of removing the language mentioned was to deny the court created under Chapter 59-622 the power to hear and decide cases of this nature, but nowhere in the written Legislative record does this history appear."

While the rules of statutory construction permit consideration of surrounding circumstances, the facts leading to the enactment of a statute and permit going outside the statutes themselves to determine their meaning (*Smith v. Ryan, Fla.*, 39 So. 2d 281; *Florida State Racing Comm. v. McLaughlin, Fla.*, 102 So. 2d 547) these rules also contemplate that those entrusted with the duty of construing said statute will be guided by records, journals and other established contemporary circumstances which are a matter of record (*State v. Amos, 76 Fla. 26, 79 So. 433*). In the instant situation we merely have a report on the intention of the legislative delegation which introduced the act in question and while there is no doubt in the mind of this office as to the integrity of this report, the Florida supreme court has previously indicated that such evidence is not sufficient to establish legislative intent. See *Security Feed and Seed Co. v. Lee, 138 Fla. 592, 189 So. 869*, wherein the supreme court held that the testimony of the members of the state senate is of doubtful verity if at all admissible to indicate what was intended by a particular statute. (See also A. G. O. 043-120, 1943-44 biennial report of the attorney general, 215, 216.

It is a generally accepted rule of statutory construction to construe laws in the light of other acts of the legislature (*State ex rel McClure v. Sullivan, Fla.*, 43 So. 2d 438; *Sanders v. State ex rel*

Shamrock Prop., Fla., 46 So. 2d 491) and in this case we must look at least as far as Chs. 76, 77, 78, 83 and 86, F. S. In this instance the primary act with which we are concerned provides in part as follows:

Said court shall have civil jurisdiction *in all cases at law* in which the demand or value of property involved does not exceed five hundred dollars, exclusive of attorney's fees, interest and costs; *said jurisdiction to be concurrent with the jurisdiction of any other court now or hereafter established in said county.* (Emphasis supplied.)

Sections 86.05 and 86.06, F. S., authorize a proceeding at law for the enforcement of statutory liens in the court having jurisdiction of the amount claimed. No court, however, is given exclusive jurisdiction in such cases. Section 78.05, F. S., provides for the commencement of an action in replevin by "the filing of a complaint as in other actions at law." Again, this chapter fails to make reference to any particular court and hence grants exclusive jurisdiction in none. Garnishment is an action at law which may be brought "in any court of this state" having jurisdiction of the amount claimed (§77.01, F. S.). While §78.03, F. S., suggests that an action in replevin should be entertained in the county court or the justice of the peace court where the property is located, said statute does not give exclusive jurisdiction in these matters to the justices of the peace courts or the county courts. Attachment proceedings are a statutory action at law and may, under the provisions of §76.03, F. S., "issue from the court which may have jurisdiction of the amount claimed by the creditors." While Ch. 83 relating to distress for rent proceedings mentions only proceedings in the county court, this act does not appear to grant exclusive jurisdiction to that court. In this regard your attention is invited to A. G. O. 051-466, p. 90 of the 1951-52 biennial report of the attorney general. It will be noted from the provisions of Ch. 59-622, §1, quoted above, that the small claims court of Leon county has concurrent jurisdiction "with the jurisdiction of any other court . . . established in said county" and, therefore, it would appear from the provisions of Chs. 76, 77, 78, 83 and 86, F. S., referred to above, that the small claims court of Leon county would have jurisdiction in these types of actions inasmuch as the actions authorized by these chapters are actions at law and the limitations thereof are not so restrictive as to prevent their being heard in a small claims court.

While the particular small claims court in question is not established under the general law relating to small claims courts (Ch. 42, F. S.) reference to that act appears justified in the interest of uniformity of the operation of small claims courts throughout the state. Section 42.11 contemplates that actions for *garnishment, attachment, replevin* and *distress rent* may be entertained in the small claims courts established under the general law and while no mention of statutory liens appears therein there seems to be no logical reason why such suits, being actions at law, could not come within the purview of that act. In support of this statement your attention is directed to the following comment set out in IX, Univ. of Fla. Law Review, p. 40:

This section (§42.11), read with §42.03, gives the (small claims) court *jurisdiction of every sort of civil action* except those vested solely in another court by the Constitution. (Emphasis supplied.)

Since the legislature is presumed to act with full knowledge of all other statutes on related matters (*Tamiami Trail v. Lee*, 142 Fla. 68, 194 So. 305) and was thus possessed with constructive awareness of the then existing general law relating to small claims courts, it would seem that had it not intended for the particular court in question to have substantially the same jurisdiction as other small claims courts in Florida it would have so provided in specific terms as it did in Ch. 30075, §1, 1955, which as pointed out above, established the forerunner of the present court.

On the basis of the comments set out above it would appear that in the interest of promoting and providing "a forum for the speedy trial of small claims cases" (Ch. 59-622 §5), the small claims court of Leon county is authorized and should take jurisdiction where requested to do so in actions at law relating to statutory liens, replevin, garnishment, attachment and distress rent where such actions do not exceed the jurisdiction of the court monetarily as defined in Ch. 59-622, §1.

All sections of your question as set out above are answered in the affirmative.

059-254—December 4, 1959

#### TAXATION

LICENSES AND LICENSE TAXES—COIN OPERATED LAUNDRY MACHINES—CH. 205; §§205.49, 205.53 AND 205.63, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Under what section of Ch. 205, F. S., should coin operated automatic laundry washing and drying machines be licensed when operating in this state?**

It appears from your file handed us with the request for opinion that there are maintained throughout the state many places of business furnishing laundry washing and drying services, to be obtained by the insertion of a coin or slug into a slot, attached to the machine or its electrical system, by which such machines are set in motion and made to operate, thereby providing laundry services to the public. The number of such machines in the several places of business varies, some maintaining only a few machines but others maintaining numerous machines. In many, if not most, such places such machines operate without attendants, other than those servicing and repairing such machines for the purpose of keeping them in good operating order. Often such machines are available for use 24 hours per day, and seven days per week.

An examination of Ch. 205, F. S., seems to reveal only two sections which seem to be applicable, §§205.53 and 205.63, F. S. Section 205.49 applies to those businesses which are of such nature "that no license can be properly required of it under any other provision of" Ch. 205, F. S. It seems evident that such coin operated machines are subject to classification under either §205.53 or §205.63, F. S. Section 205.53 applies to "every person engaged in any business, as owner, agent, or otherwise, that performs some service for the public in return for a consideration . . ." and requires that he obtain an occupational license and pay a license tax. This section would seem to be applicable, except for §205.63, F. S., which provides that "every person who operates for profit any machine, contrivance, or device which is set in motion or permitted to function by the in-

section of a coin or slug" shall pay the license tax therein provided and obtain an occupational license. Both §§205.53 and 205.63, F. S., originated as §§6 and 19 of Ch. 18011, 1937. Since this enactment there has been no material change in either section. An examination of Ch. 14491, 1929, revising the laws relative to licenses and license taxes, reveals license requirements of particular businesses performing public services, such as advertising agencies, automobile body builders, painters, etc., battery charging and repair shops, ginneries, furniture repair shops, etc., but no general classification of public services such as §205.53, F. S.; however, it has special license and license tax requirements as to vending machines operated by the insertion of a coin (§19e, Ch. 14491). Such was also the case with R. G. S., 1920, §978 thereof providing a license tax on "slot machines for vending merchandise."

Under §461, G. S., 1906, a license tax was imposed on "penny in the slot machines or any device of a similar nature." These statutes and laws demonstrate an intention on the part of the legislature to make specific provision for licensing coin operated devices. It is not to be presumed that the legislature when it revised the general license tax laws in 1937 intended to classify coin operated machines which may render a public service under §205.53, but merely those numerous businesses rendering public services that were theretofore licensed under specific headings.

We, therefore, hold that coin operated laundry washing and drying machines are subject to occupational licenses and license taxes under §205.63. We come next to the amount of the license fee applicable under said section. Under the proviso in said §205.63, vending machines "located in and operated only in a place of business for which a license has been duly issued for trading, buying, bartering, serving or selling *tangible personal property* under this or any other law of this state" are entitled to a reduced license fee. So far as we are advised by the record the machines in question are not operated in a place of business for which a license has been issued under another section of the statute; furthermore, the machines in question are not to be located in a place of business trading, buying, bartering, serving or selling *tangible personal property* but services, that of washing and drying laundry.

Answering the above stated question, such vending machines are within the purview of §205.63, F. S.

059-255—December 7, 1959

#### TAXATION

LICENSES AND LICENSE TAXES—INSURANCE VENDING MACHINES—§§626.531, 624.0300, 624.0323, 205.63, 205.43, 205.45, 205.431-205.433, F. S.; CH. 59-205

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are vending machines vending insurance policies, as authorized under §232, Ch. 59-205 (§626.531, F. S.) when coin operated, subject to the license taxes imposed by §205.63, F. S.?

Under §74, Ch. 59-205 (§624.0300, F. S.), "the state treasurer as ex officio insurance commissioner shall collect in advance, and persons so served shall pay to him in advance, fees, licenses and miscellaneous charges," for "vending machines, as authorized under



section 232" of said Ch. 59-205 (§626.531, F. S.) an "original license, each machine, permit fee . . . \$25.00, (and) annual renewal or continuation license, each machine, permit fee . . . \$25.00." Section 232 of said Ch. 59-205, regulates and authorizes the use of "mechanical vending machines or other coin operated devices" supervised by the insurance commissioner at certain locations. The license taxes imposed on vending machines (§74 (10), Ch. 59-205 (§624.0300, F. S.)) when collected are payable into the "insurance commissioner's license receipts fund" established in the state treasury (§97, Ch. 59-205 (§624.0323, F. S.)) such fund to "be used by the commissioner to assist in defraying the cost of operation of his office."

Section 205.63, F. S., provides that "every person who operates for profit any machine, contrivance, or device which is set in motion or made or permitted to function by the insertion of a coin or slug, shall pay a license tax" as therein provided. The terms of this section are sufficiently broad to include insurance policy vending machines. Section 205.63 is clearly a revenue tax and not a regulatory tax or fee. Section 74, Ch. 59-205 is the latter enactment, and repeals §205.63, in so far as it may relate to insurance policy vending machines, only if in conflict therewith, there being no express repeal of said §205.63. This brings us to the question of whether the two statutory provisions are conflicting or not.

If the tax imposed by said §74, Ch. 59-205, on insurance policy vending machines, is a revenue tax, then it repealed said §205.63, in so far as it relates to such machines, but if not a revenue tax but a regulatory fee, then there is no conflict and no repeal. This brings us to the question of what is the nature of the tax imposed on such vending machines by said §74, Ch. 59-205.

The amount of the tax imposed has often been an important factor in determining whether it is a regulatory fee or a tax for revenue purposes. "If the amount exacted does not exceed, and is intended to cover, the actual expense of issuing the license and inspecting and controlling the occupation or business . . ." it is a regulatory fee and not a tax for revenue purposes. "Where, however, it appears that revenue is the main objective of the tax, and the amount exacted is greatly in excess of the probable amount necessary to issue licenses and inspect and regulate the business, it is generally regarded as a tax for revenue" and not a regulatory fee (53 C. J. S. 454, §3; *American Can Co. v. Tampa*, 153 Fla. 798, 14 So. 2d 203, text 210). It may be noted that the tax imposed by §74, Ch. 59-205, upon insurance policy vending machines is five times (\$25) that imposed on coin operated vending machines by §205.63, F. S. (§5). Prior to the adoption of Ch. 59-205, license taxes were imposed against insurance agents and solicitors (§205.45, F. S.), insurance companies and insurers (§205.43, F. S.) and otherwise (§§205.431, 205.432 and 205.433, F. S.); these license taxes were treated as revenue and not regulatory taxes. These sections were repealed by §816, Ch. 59-205. It may further be noted that the taxes imposed upon insurance policy vending machines, together with other mentioned taxes, are paid into a continuing fund to "be used by the commissioner in defraying the cost of the operation of his office," not merely as to the subject matter of such taxes, but generally.

We find nothing in Ch. 59-205, relative to the regulation of vending machines vending insurance policies, to reveal an intention

on the part of the legislature to impose a regulatory fee instead of a revenue tax on such vending machines. We, therefore, come to the conclusion that the tax imposed by Ch. 59-205 on insurance policy vending machines is a revenue tax, and that \$205.63 was repealed thereby to the extent that it may have previously imposed a tax on such vending machines.

The above stated question is, therefore, answered in the negative.

059-256—December 7, 1959

#### TAXATION

#### OIL, GAS AND MINERAL ROYALTIES—INTANGIBLE PERSONAL PROPERTY

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are royalty interests reserved in oil, gas and mineral leases and similar documents, intangible personal property?**

"The courts have had considerable difficulty in determining the exact nature of the lessor's royalty interest, when considered independently from the reversion, and because the question is one of local law, a large number of variant rulings have been made. While some tribunals have taken the view that the royalty provided for in an existing lease is personalty, perhaps a majority of them hold it to be realty. But even among the courts subscribing to this doctrine, there are important differences. In ownership-in-place jurisdictions, a reservation of royalty under the usual form of lease is regarded as a reservation of a portion of the minerals, and a transfer of an interest therein, as a conveyance of a fraction or percentage of the gas and oil so reserved. In states wherein a lease is deemed to pass to the lessee only a profit a prendre, however, this view is rejected, and royalty is held to be an interest in real property if reserved by a lease that is capable of indefinite duration, but merely personalty if reserved by a grant enduring only for a fixed term of years." (24 Am. Jur. 599, §98). Under some leases royalty rights have been regarded as personal property (Ann. in 90 A. L. R. 774-776) and under others as real property (Ann. in 90 A. L. R. 776-780). In this connection and to the same effect see 101 A. L. R. 884-893 and 131 A. L. R. 1371-1378.

In *Miller v. Carr*, 137 Fla. 114, 188 So. 103, text 108, the court had before it an oil and gas lease encumbering lands in Pennsylvania, and the royalties therein provided for, in which case the court states that "as at the death of the decedent, oil that had not then in fact been severed from the lands was a part of the realty, and descended to his heirs . . ." but that as to royalties due for oil severed from the land prior to the death of the decedent was personal property. The opinion appears to have answered the question largely by reference to the laws of Pennsylvania. The conclusion to be drawn from these authorities is that the nature of the royalty interest in an oil, gas or mineral lease or deed is to be determined from the laws of the state wherein the lands encumbered thereby lie. "A mineral royalty affecting land has been held an interest in the land, and a contract granting or reserving a mineral royalty constitutes such royalty real property and makes the owner thereof the owner of an estate in land. An interest or right in royalties in-

cident to recovered minerals has been held personalty and not an interest in the land." (58 C. J. S. 420, §193).

The above stated question must be answered in the negative as to royalty interests yet to accrue, that is so long as the oil, gas or mineral has not been severed from the land; after severance it would seem to be personal property—if the royalty is an interest in the oil it would seem to be tangible personal property but if a payment of a sum measured by the oil, gas or minerals severed it would become an indebtedness due the lessor under the lease.

059-257—December 7, 1959

#### TAXATION

#### DOCUMENTARY STAMP TAXES—EXCHANGE OF A CLASS OF STOCK FOR ANOTHER CLASS—§201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where cumulative convertible preferred stock and 6% preferred stock are exchanged for class "A" common stock, of a corporation existing under the laws of this state, are there any documentary stamp taxes due upon such exchange?

It appears from the file, handed us with the request for opinion, that the corporation in question exists under the laws of Florida, exclusively doing business within said state; however, such exchange of stock is being made or will be made through an agent located in New York city. We are not advised whether or not the two classes of preferred stock, or either of them, contain written provision for exchanging them for the class of common stock mentioned.

Section 201.05, F. S., provides that "on each original issue, whether organization or reorganization, of certificates of stock issued in the state, or of interest in property or accumulations, by any corporation" (emphasis supplied) a documentary stamp tax is imposed as provided in and by said section. The tax imposed as aforesaid is imposed on "each original issue, whether organization or reorganization." This brings us to the question of whether the class "A" common stock issued under the above exchange of stock is an original issue of stock.

Federal tax regulation 113.25, relative to the federal tax on stock certificates, provides that "the issue of certificates of stock in exchange for outstanding certificates representing the same stock, as for instance, to reflect a change in the name of the issuing corporation or to secure several certificates for one certificate or vice versa," are not subject to the federal tax. Under federal tax regulation 113.24 "temporary or interim certificates" are subject to the tax.

"In all the cases in which the courts have had occasion to construe a statute affecting the registration, taxation or other regulation of issuance of stock, the view is entertained that the provisions of the statute are applicable only to an original issuance of the stock by which the corporation either acquires money or property in consideration thereof, or capitalizes some or all of its earned surplus, and not to a mere transformation of the existing and outstanding issued stock, by way of reclassification, split-up, or exchange of par value stock for no par value stock, or one class of

stock for another class, whereby the corporation does not acquire any new capital or add any of its earned surplus to its capital account." (Ann. in 170 A. L. R. 690-697). The act of congress imposing a stamp tax on each original issue of certificates, whether organization or reorganization, was held inapplicable, in *Edwards v. Wabash R. R. Co.*, CCA 2d, 264 Fed. 610, where a corporation, pursuant to charter authority, converted preferred stock into common stock. The same rule has been applied in state courts to exchanges of no par stock for par value stock, and vice versa (Ann. in 170 A. L. R. 694-696).

In the light of the above mentioned authorities the above question is answered in the negative, unless the transaction is in connection with a reorganization of the corporation or the organization of a successor corporation.

059-258—December 7, 1959

### TAXATION

#### LICENSE TAXES—CONSTRUCTION OF §§205.15, 205.16 AND 205.161, F. S., PROVIDING EXEMPTIONS FOR DISABLED VETERANS

To: *Egbert Beall, City Attorney, West Palm Beach*

#### QUESTION:

May a veteran, within the purview of §§205.16 or 205.161, F. S., claim the benefits thereof for businesses operated by him in two or more municipalities?

Under §§205.16 and 205.161, F. S., any disabled war veteran therein defined may be "granted a license to engage in any business or occupation in the state which may be carried on mainly through the personal efforts of the licensee as a means of livelihood, and for which the state, county or municipal license does not exceed the sum of fifty dollars without payment of any license tax otherwise provided for by law; or shall be entitled to an exemption to the extent of fifty dollars . . . where either the state, county or municipal license for such business or occupation shall be more than fifty dollars. . . ." There is a limitation in said sections that "such license shall not be issued in any county other than the county wherein said veteran is a bona fide resident citizen elector, unless such veteran applying therefor shall produce to the tax collecting authority in such county a certificate of the tax collector of his home county to the effect that no exemption from license has been granted to such veteran in his home county under the authority of this section."

When it enacted the above provisions the legislature doubtless had in mind the small businesses that may be operated through the personal efforts of one person, a person unable to perform manual labor as the term is generally used and understood. We feel that the legislature intended to extend the exemption to the business of the disabled veteran and not to single occupational licenses (1951-1952 A. G. O. 326). In the last mentioned opinion of this office it was held that the operation of a taxi and a filling station might under some circumstances compose but a single business. Section 205.16 provides the exemption for disabled veterans who carry on the business through their own personal efforts "as a means of livelihood." The exemption provided for disabled persons generally, by §205.15, F. S., is to those who have no more than one employee or helper; although §205.16 does not limit the exemption to those



having no more than one employee or helper, the purposes are the same, that is, businesses carried on mainly through the personal efforts of the licensee. The latter part of said §205.16(4) prohibits any credit under said section in a county other than that wherein the veteran has his home unless and until such veteran "produce to the tax collecting authority of such county a certificate of the tax collector of his home county to the effect that *no exemption from license has been granted such veteran in his home county under the authority of*" said §205.16. This further supports the view that a single business exemption is contemplated. Where more than one license is required for the single business operated by the veteran the exemption may be extended to such licenses; that is so long as no more than one business is to be operated.

The term "business," as used in our licensing statutes, (Ch. 205, F. S.,) means a business in the trade or commercial sense, one carried on with view to profit or a livelihood (Texas Co. v. Amos, 77 Fla. 327, 81 So. 471; 53 C. J. S. 556, §27). Such a business may be one operated entirely by its licensee or it may be a large business employing many. The phrase used in said §205.16, of a business "carried on mainly through the personal efforts of the licensee as a means of livelihood" would not usually relate to businesses of multiple employees. The purpose of the statute was to exempt those businesses which are "carried on mainly through the personal efforts of one person," the licensee, not a general exemption to all disabled veterans. The exemption is applicable in another county other than the home of the veteran only when the fact that no such exemption has been granted in the veteran's home county is certified to by the county tax assessor of his home county.

The exemption having been extended to municipalities, we feel that the same rule is applicable as between municipalities as is applicable to counties.

The above stated question is, therefore, answered in the negative, both as between counties and as between municipalities.

059-259—December 8, 1959

#### TAXATION

##### DOCUMENTARY STAMP TAXES—RETAIL INSTALLMENT SALES ACT—§§201.08(2) AND 520.30-520.42, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are revolving accounts, executed on or after Jan. 1, 1960, which state the amount of, or the method of calculating, the time price differential to be charged and paid pursuant thereto, as required by §520.35, F. S., subject to taxation under §201.08(2), F. S.?

Section 201.08(2), F. S., as added by Ch. 28216, 1953, imposes a tax "on promissory notes, non-negotiable notes, written obligations to pay money, or other compensation, made, executed, delivered, sold, transferred, or assigned in the state, in connection with sales *made under retail charge account services*, incident to sales *which are not conditional in character and which are not secured by mortgage or other pledge of purchaser, . . .*" (emphasis supplied) as therein provided. The purpose of this added subsection doubtless was to impose a tax on contracts which would otherwise be within the purview of *Metropolis Pub. Co. v. Lee*, and *Lee v. Kenan*, here-

inafter mentioned, which are made "in connection with sales made under retail charge account services, incident to sales which are not conditional in character and which are not secured by mortgage or other pledge of the purchaser." This quoted phrase limits the types of contracts which may be subjected to taxation under said §201.08 (2), F. S.

Under §520.35, F. S., every *revolving account*, within the purview of §§520.30-520.42, F. S., "executed on or after January 1, 1960, shall state the amount of, or the method of calculating, the time price differential to be charged and paid pursuant thereto or shall state that a time price differential not in excess of that permitted by this law will be charged and paid pursuant to such account." The term "revolving account," as used in this statute, "means an instrument or instruments prescribing the terms of retail installment transactions which may be made thereafter from time to time pursuant thereto, under which the buyer's total unpaid balance thereunder, whenever incurred, is payable in installments over a period of time and under the terms of which a time price differential is to be computed in relation to the buyer's unpaid balance from time to time." (§520.31(8), F. S.) "Time price differential" as used in the said statute is defined as meaning "the amount, however denominated or expressed, paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments" but not including amounts for insurance, attorney's fees, etc. (§520.31 (11), F. S.). Reference is also made to the definitions of "retail installment contract" and "retail installment transaction" as defined in §520.31 (6) and (7). Such "revolving accounts" seem to contemplate obligations to be incurred at some future time pursuant to an agreement previously made. They seem to embrace and provide for the financing of purchases to be made some time subsequent to the execution of the agreement for the revolving account in question.

Such revolving contracts bear a relation to the advertising contract considered in *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, which involved a written agreement to pay for advertising space as and when used, which was held nothing more than an executory agreement to purchase advertising space, the amount of which was so uncertain at the time of the making of the agreement that the amount of the space used could not be determined at the time of the making of the agreement. To like effect was the agreement to purchase and pay for electricity as used involved in *Lee v. Kenan*, CCA Fla., 78 Fed. 2d 425, 100 A. L. R. 869. The revolving accounts in question are of the same nature and within the rule in the above mentioned court decisions unless taken out of that rule by §201.08 (2), F. S. Only where such revolving accounts are in connection "with sales made under retail charge account service, incident to sales which are not conditional in character and which are not secured by mortgage or other pledge of purchaser," are they within the purview of §201.08 (2), and subject to taxation thereunder. This answers the above stated question.

059-261—December 14, 1959

## CITIES AND TOWNS

POLICEMEN—CONSTRUCTION OF §185.34, RELATING TO DISABILITY IN LINE OF DUTY—§§185.01-185.35; CH. 185, F. S.

To: James J. McVeigh, Assistant City Attorney, Miami

## QUESTION:

Is §185.34, F. S., of general operation, or is its operation limited to policemen's retirement funds existing under Ch. 185, F. S.?

Section 185.34, F. S., provides that "any condition or impairment of health of any and all police officers employed in the state caused by tuberculosis, hypertension, heart disease or hardening of the arteries, resulting in total or partial disability shall be presumed to have been suffered in line of duty unless the contrary be shown by competent evidence, provided, however, that such police officer shall have successfully passed a physical examination on entering into such service, which examination fails to reveal any evidence of such condition. Nothing herein shall be construed to extend or otherwise affect the provisions of chapter 440, pertaining to workmen's compensation. All laws, including *local and special laws*, in conflict herewith are repealed." (Emphasis supplied.) This section was derived from Ch. 57-340, the title to which labeled it as "an act providing that any condition or impairment of health of any and all police officers employed in the State of Florida caused by tuberculosis, hypertension, heart disease or hardening of the arteries, resulting in total or partial disability, shall be presumed to have been suffered in line of duty; and repealing all laws in conflict herewith." Both the statute and its title are broad in their scope; nowhere in either is there anything to limit their operation to retirement under and pursuant to §§185.01-185.33, F. S., which were derived from Ch. 28230, 1953.

This brings us to the question of the effect of the codification of said Ch. 57-340 under Ch. 185, F. S. The present title to Ch. 185, F. S., is "Policemen's Retirement Fund; Policemen Generally." Under Florida Statutes 1953 and 1955 the title to said Ch. 185 was "Policemen's Retirement Fund." When Ch. 57-340 was codified into the Florida Statutes, as §185.34, the title to said chapter was extended by adding thereto the further phrase "Policemen Generally," thereby expanding the subject matter of the said chapter. The statutory revision department was without authority to change the import and extent of said Ch. 57-340 while codifying the same, in the absence of a revisor's note calling the attention of the legislature to such a change (*Foley v. State, Fla.*, 50 So. 2d 179).

"The juxtaposition of statutory provisions as a result of rearrangements in codes, revisions or compilations is not decisive of the effect or application of such provisions. Such rearrangements are ordinarily not regarded as altering the construction of the statutes included in the compilation. The classification and arrangement should not obstruct or obscure the interpretation of the law as a whole, or the meaning derived from the history and express provisions of the law. It is clear that the place assigned to a statute in a compilation cannot control the plain meaning expressed in the statute itself." (50 Am. Jur. 466 and 467, §448). "It is a generally accepted view in the United States that resort may be had to the

title of an act as an aid in its interpretation. In construing a provision of a code or compilation, it is generally regarded as legitimate and proper to consider the title of the original act." (50 Am. Jur. 467, §449). "In case of doubt and uncertainty as to the meaning of a provision of a code or of compiled or revised statutes, resort in ascertaining its true meaning may properly be had to the act from which the provision was derived. . . . Indeed, it is a settled rule of construction that where the entire legislation affecting a particular subject-matter has undergone revision and consolidation by codification the revised sections will be presumed to bear the same meaning as the original sections and will generally be so construed. The legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation. . . . (50 Am. Jur. 464 and 465, §446).

Although there is some authority to the contrary, "there is authority in support of the view that, in arriving at the true construction of any particular section of a code, very little reliance may be placed upon the heading under which it may be found. . . . There the headings are inserted for convenience of reference by clerks or revisors, who have no legislative authority, they cannot lessen or expand the meaning of the statutory provision, and are not to be considered as an aid in interpretation. In any event, a heading is not an element proper for consideration where the provision under review is not one of doubtful import." (50 Am. Jur. 468, §450). This appears to be the rule in this state (*Berger v. Jackson*, 156 Fla. 251, 23 So. 2d 265, text 267).

It is evident, from the above and foregoing, that §185.34, F. S., is not limited in its operation to the policemen's retirement fund provided under §§185.01-185.33, F. S., but takes the construction that Ch. 57-340, from which it was derived, took prior to codification. This leads to the conclusion that said §185.34, F. S., is applicable, as raising a presumption, to those policemen coming within its purview for all purposes where the health of the policeman becomes material, whether in connection with retirement under Ch. 185, F. S., or otherwise, including municipal retirement systems generally. Chapter 57-340, now §185.34, repealed "all laws, including local or special laws, in conflict" therewith, at the time of its adoption, which was June 5, 1957. We gather from the request for opinion that the Miami retirement system was adopted under and pursuant to Ch. 18689, 1937 (a special or local act) and subject to the provisions thereof. Anything in said Ch. 18689 conflicting with Ch. 57-340, now §185.34, was expressly repealed by said Ch. 57-340. *Any provision in the Miami municipal retirement system, which may have conflicted with §185.34, F. S., must be deemed repealed by it.*

We, therefore, submit that §185.34, F. S., is of general operation, and is not limited in its operation to policemen's retirement funds under Ch. 185, F. S.



059-262—December 14, 1959

## CITIES AND TOWNS

PLEDGING MUNICIPAL CREDIT—OPTION TO BUY REAL ESTATE, ADVANCES FOR—§10, ART. IX, STATE CONST., CH. 31322, 1955

To: Bryan Willis, State Auditor, Tallahassee

## QUESTIONS:

1. Where a municipality holds an option to purchase certain real estate, is there a violation of the statutes or constitution where said municipality advances to the owner of the real estate sums of money substantially in excess of the normal option fee when said advances are to be credited to the purchase price if and when the city exercises its option?

2. Where a municipality has an option to purchase real property is there a statutory or constitutional violation where the city in consideration of an extension of its option to purchase such real estate pays in behalf of the owner of such real estate interest on certain indebtedness of such owner and taxes on certain of his property, such payments not being made to the owner of such real estate but instead directly to his creditors?

## AS TO QUESTION 1:

Section 10, Art. IX, State Const., provides in part:

The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, *or to loan its credit to*, any corporation, association, institution or individual. (Emphasis supplied.)

The particular municipality involved at this time has the authority to purchase property within or without the present city limits (Ch. 31322, Art. XXII, §2 (B) (1), special acts, 1955) and it is implied therefrom that said municipality has the authority to purchase an option to buy said property at a reasonable price. Such a purchase would not be a pledge of municipal credit as is prohibited by §10, Art. IX, State Const.

In the instant situation, however, it appears that the option price is substantially more than a normal option price and thus it would appear that until the city actually exercises its option it is in fact lending money in a manner not authorized by law which is a violation of §10, Art. IX, State Const.

In reality it appears to this office that the city is trying to do indirectly what it cannot do directly under the guise of an option agreement.

It might be pointed out in passing, however, that once the option is executed and the municipal funds are then applied toward the purchase price of the property the prohibited extension of credit will no longer exist and the question will become moot.

## AS TO QUESTION 2:

The payment of interest on indebtedness and taxes on the property in question on behalf of the owner but directly to the creditors is merely further evidence of the extension of municipal credit in an effort to do indirectly what the city could not do directly.

059-263—December 14, 1959

**SCHOOL CODE—CHILD WELFARE**  
**PERFORMANCE OF TUBERCULIN TEST OF SCHOOL CHILD-**  
**DREN—CONSENT OF PARENTS—§§232.29, 232.30,**  
**230.23(6) (f), F. S.**

To: *Dwight J. Wharton, Florida State Board of Health, Jacksonville*

**QUESTION:**

**Is it necessary for the state board of health to obtain the written consent of parents before performing the tuberculin test on children in the public schools?**

The tuberculin test, as outlined in your letter consists of the following:

. . . Inserting a very small hypodermic needle (the smallest one in general use, known as #26 gauge, half inch or less in length) into the superficial layers of the skin. The tuberculin material is injected into the skin and not under it.

When a person *has been infected with tuberculosis* there is the red, slightly swollen area at the site of the injection. This may be from  $\frac{1}{4}$  inch to slightly larger than one inch in diameter. It starts to fade out in about three days and slowly disappears. It has never caused death or loss of limb. A "positive" reaction indicates the possibility of tuberculosis in the child or in a contact of the child. It is a very useful case-finding procedure, more valuable in children than in adults." (Emphasis supplied.) Section 232.29, F. S., provides:

The state board of education and the state board of health shall jointly prescribe uniform forms, rules and regulations, and, through their executive officers, shall arrange for the examination at appropriate intervals of each child attending the public schools of the state for the purpose of discovering, reporting, and promoting treatment of mental and physical defects that require medical or surgical treatment for the proper development of each child. Section 232.30, F. S., provides:

Subject to these rules and regulations the state board of health shall have supervision over all matters pertaining to the medical examination of school children in Florida, with such duties and powers as are prescribed by law pertaining to public health, and all school children shall be examined as to their physical condition at appropriate intervals. Any work done by health authorities in schools shall be arranged with the school authorities provided, however, that *any child shall be exempt from medical or physical examination, or medical or surgical treatment, upon written request of the parent or guardian of such child who objects to the examination and/or treatment on religious grounds, and provided further that the laws, rules and regulations relating to contagious or communicable diseases and sanitary matters shall not be violated.* (Emphasis supplied.)

Section 230.23(6) (f), F. S., provides:

Provide for all children of school age in the county to have periodic physical and dental examinations and, insofar as practicable, arrange and cooperate with other organizations for the prompt treatment of all pupils who are in need of remedial and preventive treatment; provided, *that except in emergencies pupils may be given remedial or preventive treatment only on written consent of the parent.* (Emphasis supplied.)

I find no Florida statute which either specifically authorizes or makes mandatory the use of the tuberculin test for school children.

According to information derived from the American illustrated medical dictionary, 18th Ed., pp. 1445 and 1512, the tuberculin test is a method for detecting tuberculosis in a person by the injection of a sterile liquid containing the growth products of, or specific substances extracted from the tubercle bacillus; that in healthy persons it produces no appreciable effect, but in tuberculous persons it produces a moderate fever, which lasts for several hours, and also a swelling and redness in tuberculous lesions of the person. It also appears that the tuberculin test is not new but that the first form was prepared by boiling, filtering and concentrating a bouillon culture of tubercle bacilli which was put forth by Kosh in 1890 as a cure for tuberculosis. Now, in its various forms tuberculin is used in the diagnosis of tuberculosis infection, especially in children and cattle.

The power of a state to require vaccination is well established (Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 S. Ct. 358 (1905); Zucht v. King, 260 U. S. 174, 67 L. Ed. 194, 43 S. Ct. 24 (1922)).

It has however been challenged specifically as an unconstitutional interference with religious freedom. The cases generally involve prosecution of parents under the compulsory education laws, for failing or refusing to vaccinate children as a condition for admission to the public school (Seubold v. Fort Smith Special School District, 218 Ark. 560, 237 S. W. 2d 884 (1951); Anderson v. State, 84 Ga. App. 259, 65 S. E. 2d 848 (1951); Vonnegut v. Baum, 206 Ind. 172, 188 N. E. 677 (1934); Mosier v. Barren County Board of Health, 308 Ky. 829, 215 S. W. 2d 967 (1948); Commonwealth v. Green, 268 Mass. 585, 168 N. E. 101 (1929); State v. Drew, 89 N. H. 54, 192 Atl. 629 (1937); Sadlock v. Board of Education, 137 N. J. 85, 58 Atl. 2d 218 (1948); In re Whitmore, 47 N. Y. Supp. 2d 143 (1944); Viemeister v. White, 179 N. Y. 235, 72 N. E. 97 (1904); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1919); see also, Walker v. Dallas Independent School District, 75 F. Supp. 552 (N. D. Tex., 1948)).

In Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779 (1914), the court upheld a requirement of physical examination and report by a physician as prerequisite of admission to public school against religious freedom objections.

In Peterson v. Widule, 157 Wis. 641, 147 N. W. 966 (1914), the court held that it was not a violation of freedom of religion for a state to require examination for venereal disease prior to obtaining a marriage license.

In view of the above, I believe that under existing Florida law the state board of health acting in cooperation with school authorities has legal authority to require routine physical exami-

nation of school children unless the child's parents file a written request that the child be exempt.

I do not believe, however, that this rule would apply to the tuberculin test since it involves the injection of tuberculin material into the skin rather than a simple physical observation.

Before this type of test is given, I believe that the tuberculin test should be explained to the parent and his written consent obtained for its use on the child.

Subject to the above comment, your question is answered in the affirmative.

059-264—December 14, 1959

#### PUBLIC MONEYS

#### FEDERAL DEPOSIT INSURANCE CORPORATION COVERAGE ON MONEYS PAID INTO COURT AND DEPOSITED PUR- SUANT TO §54.04, F. S.

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

#### QUESTION:

Does federal deposit insurance corporation (FDIC) coverage apply separately to moneys paid into a court and subsequently deposited under the provisions of §54.04, F. S., if the state treasurer or the clerk of the circuit court, either or both, has deposited other state or county money in the same bank in other accounts?

The pertinent provisions of §54.04, F. S., provide in part:

54.04 *Moneys paid into court; disposition.*—All moneys paid into any court of the state and received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer of the state or in a designated depository of funds for the state, in the name and to the credit of such court, and every such depository that shall receive such moneys shall forthwith furnish security, to be approved by, and deposited with, the treasurer of the state, in an amount necessary to fully protect the full amount of such deposit at all times. . . . (Emphasis supplied.)

The above-quoted provisions clearly require that moneys, when deposited in a designated depository, should be deposited "in the name and to the credit of such court."

The amount of federal deposit insurance corporation coverage and the extent of such coverage is set forth in subsection (m), 12 U. S. C. A., Banks and Banking, §1813, p. 352, as follows:

(m) The term "insured deposit" means the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of \$10,000. Such net amount shall be determined according to such regulations as the Board of Directors may prescribe, and in determining the amount due to any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others except trust funds which shall be insured as provided in subsection (i) of section 1817 of this title." (Emphasis supplied.)



The italicized portions of the above-quoted matter, particularly the words "maintained in the same capacity and the same right," will determine whether a particular deposit is separate and distinct from another so as to entitle it to a separate and distinct coverage.

It appears that your inquiry relates to a situation where the clerk of the circuit court or the state treasurer, acting in accordance with the provisions of §54.04, *supra*, deposits moneys paid into court in a designated depository in the name and to the credit of such court; and there exists at the same time, in the same depository, other accounts containing moneys deposited by either or both the state treasurer and the clerk of the circuit court. A similar situation was present in *Federal Deposit Ins. Corp. v. Casady*, 106 F. 2d 784 (1939) and *Billings County v. Fed. Deposit Ins. Corp.*, 71 F. Supp. 696 (1947). In the *Casady* case, *supra*, John Casady, as treasurer for the town of Cheyenne, carried five separate and distinct deposits at all times designated and appearing on the books of the bank as separate deposits. These five deposits were for: (1) City of Cheyenne sinking fund; (2) City of Cheyenne paving fund; (3) Firemen's pension fund; (4) City of Cheyenne meter fund; (5) Cheyenne general fund. When the bank failed, Casady sought to recover against the FDIC for each separate and distinct deposit. The court of appeals held that:

Under Oklahoma law, a municipality's sinking fund, paving fund, firemen's pension fund, meter fund, and general fund, all of which were deposited in same bank by municipality's treasurer and controlled by him, constituted distinct deposits on each of which federal deposit corporation, upon bank's failure, was liable up to \$5,000, as against contention that all of the deposits constituted one deposit and that corporation was liable only to the extent of \$5,000 on the combined deposits. (Headnote 12, 106 F. 2d 784 at p. 785.) (NOTE—at time of case, FDIC liability was only \$5,000; later amended to \$10,000.)

The court's holding was based upon its determination that the sinking, meter, paving, and firemen's funds constituted separate trust funds for the respective owners and holders in such capacity in a separate right; and these funds were not maintained in the same capacity and the same right by the treasurer as the maintenance of the general fund.

The moneys deposited by the clerk under §54.04, F. S., or the state treasurer "in the name and to the credit of the court" in the instant inquiry could logically be classified as funds held in trust for parties before the court and maintained in a different capacity than other moneys deposited by the clerk or the treasurer in the same bank. It is interesting to note that trust fund deposits as such are considered by the FDIC as separate from other deposits and entitled to a separate \$10,000 FDIC maximum coverage. (See title 12, *supra*, §1870 (i), p. 359, U. S. C. A.)

In the Billings county case, *supra*, the county had brought an action against FDIC to recover amounts of deposit insurance liability on five deposits held by the treasurer in one capacity and two other deposits held in another capacity. The county contended that the five certificates representing a sinking fund were deposited in a separate right and capacity from a deposit in a general checking account and a deposit claim based upon an outstanding draft

in transit, and that accordingly the FDIC owed an additional liability on the total of such certificates of deposits. The FDIC contended that *all* of the above-stated deposits were maintained by the county or its treasurer in the same capacity and the same right, and that the FDIC was liable for coverage on one deposit only.

The court discussed the purposes of the FDIC coverage and stated:

One of the purposes of this section was to make a separate insured deposit of an account maintained by a depositor in a different capacity and a different right from that in which such depositor maintained some other account. Were that not true, the statute would have provided that the amount due any depositor should be determined by adding together all deposits maintained in the bank by such depositor. . . . (71 F. Supp., supra, p. 700) The court held for the county and stated:

. . . The five certificates of deposit, representing moneys collected and held in a sinking fund for the purpose of paying the 1921 bond issue, *were not held by the treasurer in the same capacity and the same right as the first two mentioned deposits.* Money in the open checking account and presumably the money represented by the draft in transit represented general funds of the county, unearmarked for any specific purpose, and which was subject to withdrawal by the county through its duly authorized representatives for any legitimate, legal county purpose. The five certificates of deposit represented earmarked money deposited specifically for one purpose only, namely, the refunding of the 1921 bonds. *The two deposits were not made or maintained in the same capacity and the same right.* (71 F. Supp., supra, p. 700) (Emphasis supplied.)

Of particular importance is the concluding argument of the court at p. 702:

. . . We are concerned solely herein with the question of whether or not the plaintiff, through its treasurer, made all of the deposits in the Stockmen's State Bank "in the same capacity and the same right." The money represented by the certificates of deposit was held by the treasurer with the legal obligation to "*maintain*" it separately in his "*capacity*" as trustee for the benefit of the bondholders and the "*right*" to pay out only for the purpose of redeeming the bonds. This is a different capacity and a different right from which the treasurer maintained the general checking account representing general funds of the county unimpressed with a separate specific statutory obligation as to use. The general open checking account was maintained by the treasurer in his capacity as custodian of all of the funds of Billings County. The certificates of deposit were maintained by the treasurer in his capacity as custodian of funds raised by Billings County as a taxing district for the benefit of the bondholders and impressed with the statutory limitation that such could be used only to refund the bonds and that they must be kept "in a separate special fund" for that purpose.

In view of the provisions of the FDIC act and the cases here-

inabove referred to, I am of the opinion that moneys paid into court and subsequently deposited in the *name and to the credit of such court* by either the clerk of the circuit court or the state treasurer are separate and distinct from any other moneys deposited by such officers and are not maintained in the same capacity and the same right; hence, such deposits made under §54.04, supra, are entitled to separate and additional FDIC coverage. These moneys, which by statute are required to be deposited *in the name and to the credit of the appropriate court*, would seem to be held in the capacity different from moneys deposited by the clerk or the state treasurer in other accounts or in general accounts, respectively.

It would appear that in order to entitle the moneys deposited under §54.04, supra, to a separate FDIC coverage said section should be strictly complied with; in particular, such deposit should be made "in the name and to the credit of such court" thereby indicating that such deposit is being made in a particular capacity, right, and benefit separate and distinct from other deposits by the same officer in the same bank.

In addition, it may be advisable that the clerks' or treasurers' deposit slips show the beneficiaries of the deposits thereby clearly indicating the distinct capacity of the deposits and, thus, more effectively assuring that the moneys deposited by such officers will receive this separate and additional FDIC coverage.

Again, I call your attention to the provisions of 12 U. S. C. A., Banks and Banking, §1813, p. 352, set forth earlier in this opinion in regard to the limitations of the FDIC coverage.

Your question is answered in the affirmative.

059-265—December 15, 1959

### COURTS

JUVENILE COURT—REFERRAL OF CASES TO MASTER FOR FINDINGS AND RECOMMENDATIONS—§3, CH. 26880, 1951 (JUVENILE COURT ACT); §39.09(2), F. S.

To: Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando

### QUESTION:

May a juvenile judge refer a case to a master, member of the Florida Bar, who would hear the facts and make recommendations to the judge?

Section 3 of Ch. 26880, 1951, known as the juvenile court act, provides, among other things, as follows:

Those provisions of the Special Acts in effect upon the effective date of this act, applying to the separate Juvenile Courts heretofore established in the counties of . . . Orange . . . which . . . provides for referees . . . are not repealed. (Emphasis supplied.)

In reviewing the special acts relating to the juvenile court of Orange county I do not find a provision which provides for the appointment of referees or a master by the juvenile judge.

Section 39.09(2), F. S., provides, among other things:

Hearings shall be conducted by the judge without a jury, applying the rules of evidence in use in equity cases in the circuit courts, and adjourning the hearings from time to time as necessary. (Emphasis supplied.)

In view of the foregoing, it is my opinion that it is the duty

of the judge of the juvenile court to hear the cases coming within its jurisdiction.

Your question is answered in the negative.

059-266—December 17, 1959

### INCOMPETENCY PROCEEDINGS

#### LIABILITY OF COUNTY FOR COSTS UNDER §394.22, F. S.

To: W. Kenneth Barnes, Attorney, Pasco County, Dade City

#### QUESTION:

Is the county in which an alleged incompetent resided liable to the county in which said incompetent is temporarily located for the costs of incompetency proceedings instituted in the latter county in the event the alleged incompetent is indigent?

Section 394.22, F. S., relates to the procedure for adjudication for persons mentally or physically incompetent. The pertinent provisions of §394.22(1), *supra*, provide as follows:

Whenever any person within this state is believed to be incompetent by reason of mental illness, . . . application by written petition, under oath, *may be made to the county judge of the county wherein the alleged incompetent resides or may be found*, . . . (Emphasis supplied.)

It is further stated in §394.22(7) (b) and (c), *supra*, relating to payment of fees in the event of indigency of the incompetent as follows:

(b) At any state of the proceeding the judge may, upon the application of any alleged incompetent *who is indigent*, appoint an attorney to represent said person, and the compensation of said attorney shall be fixed by the court in an amount not to exceed fifty dollars and *shall be paid by the county commissioners out of the general fund of the county*. (Emphasis supplied.)

(c) If the alleged incompetent person is found to be *indigent* and unable to procure the attendance of witnesses in his behalf, the judge shall, upon written application therefor, summon a reasonable number of witnesses for such person, and the witness and mileage fees of said witnesses *shall be paid by the county commissioners of the county from its general fund*. (Emphasis supplied.)

The word "county" as cited in §394.22(7) (b) and (c), *supra*, refers to "the county wherein the alleged incompetent resides or may be found" as is stated in §394.22(1), *supra*.

It would appear that since incompetency proceedings may be instituted in the county wherein the alleged incompetent resides or *may be found*, the cost of such proceeding should be assumed by the county wherein the proceeding is actually held regardless of the permanent nature of the residency of the incompetent in said county.

I am unable to find any statutory authority creating a liability of one county to another in the event incompetency proceedings are instituted against a permanent resident of one county while such person is temporarily residing in another county.



059-267—December 17, 1959

**TAXATION**  
**LICENSES AND LICENSE TAXES—OUTDOOR THEATRES**  
**OPERATING TWO OR MORE SCREENS—§205.01;**  
**CH. 205, F. S.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Is more than one occupational license required for an outdoor theatre having two viewing screens upon which the same picture is usually shown, but which occasionally shows different pictures, charging separate admissions for each?**

The theatre giving rise to the above question "normally shows the same program on each screen, but on occasion complete and different programs are shown. The theatre has only one entrance and the customer has a choice of which movie he wishes to attend, but is not allowed to see both movies on one admission charge. When the same program is shown on both screens, the customer may select either side from which to view it."

The above quotation is from the file handed to us with your request for an opinion. We have been furnished a rough map of the theatre area from which it appears that although there may be said to be a single entrance, such entrance is divided into two passage ways divided by shrubbery and the ticket booth.

There are separate concession stands and projector booths for each screen. The structure supporting the two screens is a common structure with separate screens, one on each side. From these observations, the question appears to resolve itself into the determination of whether there is operated one business or two businesses.

Under §205.01, F. S., "no person shall engage in or manage any business, profession or occupation for which an occupational license tax is required under this chapter (Ch. 205, F. S.), or under the law of this state unless a state license or a state and county license or a county license, as the case may be, shall have been procured. . . ."

The term license tax has a well settled connotation in legal terminology and has reference to a charge imposed for the privilege of engaging in a business or profession (*City of St. Petersburg v. Florida Costal Theatres*, 43 So. 2d 525).

Where a person operates more than one business subject to taxation at the same location; for example, a wholesale and a retail business, he may be required to obtain two licenses and pay two license taxes (*Florida Sugar Dist. v. Wood*, 135 Fla. 126, 184 So. 641).

"Licenses to conduct theatrical exhibitions or other public amusements are construed to embrace within their terms such other entertainments as are of the same general character as those specified. . . . However entertainments which are not of the same kind as that licensed are not within the protection of the license." (86 C. J. S. 698, §24).

If a person carries on two or more distinct kinds of businesses, he is taxed in respect to each; but a city cannot divide a single taxable privilege and require a separate license for each of the elements of the rights that accrue to citizens thereunder (*Cooley, Taxation*, Vol. 4, §1684).

From the foregoing, it appears that two separate and distinct businesses regardless of location subject each business to an occupational license tax. By the same token, one general business which has several facets of operation, similar in scope and purpose, at the same location appears to fall within the classification of one business. The facts in the instant situation indicate that the outdoor theatre procured one occupational license for the purpose of engaging in the outdoor theatre business at a given location. The physical arrangement of this theatre is such that the patrons are afforded a choice of viewing the movies shown on either side of the same screen. Normally, the same movie is projected simultaneously on both sides of the screen but occasionally the customer is given a choice between two different movies being shown on opposite sides of the screen. In either case it would appear that the owner is engaged in the single general occupation of operating an outdoor theatre which is within the purview of his license.

It is therefore my opinion that in the absence of a clear indication that such arrangement was deliberately designed to circumvent the occupational license provisions of Florida law it should be considered as one business and that the owner be required to purchase only one license. Accordingly, your question is answered in the negative based on the specific facts available.

059-268—December 18, 1959

#### COURTS

JUSTICE OF THE PEACE—HANDLING OF CASH APPEARANCE BONDS BY SHERIFF—§§903.34(2), 219.01, 219.02;  
CH. 219, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. Should a sheriff who has accepted a cash appearance bond from a defendant for his appearance in a justice of the peace court transmit the money and the undertaking to the court, or should he transmit the undertaking and retain the money for disposition in accordance with the order of the court?

2. Would the provisions of Ch. 57-991, a population act applying only to Pinellas county, change the answer to the above question as to Pinellas county?

#### AS TO QUESTION 1:

The authority of a sheriff to approve and accept a cash appearance bond is apparently contained in §903.34(2), F. S. No mention is made in said section requiring the transmission to the justice of the peace of the money received by the sheriff.

Chapter 219, F. S., relates to the handling of county public money by the various officers of the county. (See §219.01, F. S.) The provisions of §219.02, *supra*, specifically control the handling and accounting of public money. The procedures set forth therein are thorough and comprehensive.

In addition to the procedures set forth in Ch. 219, *supra*, the state auditing department has furnished a book of instructions for the guidance of sheriffs in connection with the proper handling of public money received by them. Examination of these instructions, read in conjunction with the provisions of Ch. 219, *supra*, indi-

cates that it was contemplated that the sheriff retain moneys received from cash appearance bonds. This is illustrated by the following language appearing on p. 11 of the "instructions for using the forms of the Florida sheriff's finance system" prepared by the state auditing department relating particularly to the refunding of cash appearance bonds:

*All bonds accepted by the officer should be entered on the bond register regardless of whether they are for appearance in a court located in the home county, or are for transmittal to another county. . . .*

*All cash appearance bonds should be refunded by check made out to the individual who deposited the money unless the sheriff has a written authorization to pay it over to a third party. The number of the check should be shown in the bond register.*

When the depositor authorizes the payment of fines or costs from the appearance bond, two checks should be written totaling the amount of the bond. One check, for the amount of the fine or cost to be paid, should be written to the depositor and endorsed by him, or if the depositor is not available, it should be written to the sheriff and endorsed by him. This check should be treated as an entirely new payment of money and a regular receipt on Form 57-1 should be given just as if it were a new transaction. The second check, for the balance of the bond amount, should be written to the depositor and delivered to him in normal fashion. (Emphasis supplied.)

It would appear to be a difficult matter for a sheriff to comply with the regulations as quoted above if, at the time he received a cash appearance bond from a defendant, he transmitted such money to the justice of the peace. Such regulations would, in that instance, be superfluous.

It should be noted that Ch. 219, *supra*, does not require a sheriff to transmit moneys authorized to be collected by him to the justice of the peace.

Apparently, it has been a fairly uniform practice throughout the state for a sheriff to retain money received by cash appearance bonds until it was either returned to the defendant or remitted to the fine and forfeiture fund, as ordered by the justice of the peace court. It is the duty of the officer collecting public money to exercise all possible care for the protection of said money received in his custody. (See §219.02, *supra*.) In addition to the safeguards afforded for the keeping of public moneys by Ch. 219, F. S., §1 of Ch. 59-354 (amending §903.26, F. S.), requires that all officers (including sheriffs) deposit forfeited bail bond funds in the county fine and forfeiture fund within certain designated time limitations. It would seem that the protection and safekeeping of moneys received by a sheriff by virtue of a cash appearance bond would be best accomplished by retaining such money until final disposition of the case.

In view of the above statements, I am of the opinion that a sheriff who has accepted a cash appearance bond from a defendant for his appearance in a justice of the peace court should retain the money for disposition in accordance with the order of the court.

Question 1 is answered accordingly.

AS TO QUESTION 2:

Examination of Ch. 57-991, a population act relating to Pinellas county, indicates that the provisions of said act specifically relate to all money received by a justice of the peace. No mention is made in said act of cash appearance bonds received by a sheriff. I am of the opinion that since said chapter does not relate to the handling of money received by a sheriff, the provisions thereof would not affect the right of the sheriff to retain money received by a cash appearance bond.

Question 2 is therefore answered in the negative.

059-269—December 18, 1959

#### WEAPONS AND FIREARMS

LICENSE TO CARRY PISTOLS OR OTHER FIREARMS—PERMIT VALID ONLY IN COUNTY OF ISSUE—§§790.05 AND 790.06, F. S.

To: John Hathaway, Representative, Charlotte County, Punta Gorda

#### QUESTION:

Is a license to carry pistols or other firearms issued by one county authorization to carry such firearms in all other counties of the state?

Sections 790.05 and 790.06, supra, provide, respectively, as follows:

Whoever shall carry around with him, or have in his manual possession, *in any county in this state*, any pistol, winchester rifle or other repeating rifle, *without having a license from the county commissioners of the respective counties of this state*, shall, upon conviction thereof, be punished by fine. . . . (Emphasis supplied.)

*The county commissioners of the respective counties of this state* may at any regular or special meeting grant a license to carry a pistol, winchester or other repeating rifle, *only to such persons as are over the age of twenty-one years and of good moral character*, for a period of two years, upon such person giving a bond payable to the governor of the state in the sum of one hundred dollars, conditioned for the proper and legitimate use of said weapons, with sureties to be approved by the county commissioners. . . . (Emphasis supplied.)

It is clear from the italicized portions of the above-quoted sections that it is unlawful to carry certain weapons in *any county* in the state without securing a license from the county commissioners of the *respective counties of this state*. It would therefore logically follow that if a resident of the county applies to the board of county commissioners of the county wherein he resides, a grant of such license by that board would not constitute authorization of a licensee to carry firearms in another county of the state without first obtaining an additional license from each other county wherein the weapon is taken.

It should be pointed out that according to the provisions of §790.06, supra, the issuing of a license by the county commissioners is *permissive* only and not *mandatory*. It is within the sound discretion of the county commissioners to determine whether an applicant possesses good moral character (assuming, of course, the applicant



is over 21 and is otherwise qualified under the law) to warrant the issuing of a license.

In this regard, I call your attention to an earlier opinion rendered by my predecessor on Oct. 23, 1931, wherein he stated:

There is no law in the State of Florida authorizing you to obtain a bond whereby you may carry a pistol in any part of the State. It is left with the County Commissioners of each county as to whether a permit may be granted in that particular county. (Emphasis supplied.)

It is also stated in opinion 051-105 at p. 722 of the 1951-52 biennial report of the attorney general:

. . . The permits or licenses provided in this chapter are valid only in the county in which the permit is issued and do not entitle licensee to carry a concealed weapon . . . . (Emphasis supplied.)

In light of the above statements, I am of the opinion that a license to carry pistols and other firearms issued by one county is not authorization to carry such weapons in all other counties of the state, and that it is necessary to obtain a license in each county where such weapons are taken.

Your question is therefore answered in the negative.

059-270—December 18, 1959

#### LEGISLATION

CH. 59-994 (ESTABLISHING NORTH PALM BEACH WATER CONTROL DISTRICT) EFFECTIVE DATE—BOUNDARY PROVISIONS—CH. 59-1977; §28, ART. III, STATE CONST.

To: *Madison F. Pacetti, West Palm Beach*

#### QUESTIONS:

1. Where the legislature in establishing a special taxing district defines the general area of the district, but excludes therefrom "all incorporated municipalities" is that exclusion progressive so as to include future extension of municipal boundaries?

2. Where an act of the legislature by its final adjournment leaves adopted bills on the governor's desk, so that the time for veto is extended to 20 days after adjournment, what is the effect of the transmittal of such bill to the secretary of state without written approval prior to the end of said 20 day period?

The legislature, by Ch. 59-994, established the Northern Palm Beach water control district in Palm Beach county, defining its area by a metes and bounds description; excluding, however, from such description "all incorporated municipalities." Section 28 of this act provided that it "shall take effect immediately upon its approval by the governor, or upon its becoming a law without such approval." Subsequent to the effective date of the said Ch. 59-994, the boundaries of one of the incorporated municipalities, within the boundary described in said act, were extended so as to overlap a portion of the said district as it existed on the effective date of the act.

The question seems to be whether or not the statutory exclusion contained in the act is ambulatory or fixed. "Exceptions, in a statute, as a general rule, should be strictly construed, and at the same time, exceptions should be reasonably construed; they extend only as far as their language fairly warrants, and all doubt should

be resolved in favor of the general provision rather than the exception. A person claiming the benefit of an exception must establish that he comes within it. However, an exception must be construed in conformity with the purpose and meaning of the statute . . ." (82 C. J. S. 891-893, § 382). The legislature has jurisdiction to determine what lands may be included within a drainage or similar district (*Martin v. Dade Muck Land Co.*, 95 Fla. 530, 116 So. 449; *Bannerman v. Catts*, 80 Fla. 170, 85 So. 336), and may include therein territory of incorporated municipalities (28 C. J. S. 241, §7, note 85). We doubt that the legislature by the exception of municipalities from the water control districts intended to make the exception ambulatory as to future extension of the municipalities. This seems to lead to a negative answer to question 1.

Although we accept your statement that the extension of the municipality "took place around the middle of November, 1959," we call your attention to Ch. 59-1977, which extended the municipal limits of West Palm Beach, which act became a law without the governor's approval and was filed in the office of the secretary of state on June 12, 1959. The bill, which became Ch. 59-1977, went to the governor's office sometime after June 1, 1959, so that the 20 day provision of §28, Art. III, State Const., for action by the governor became applicable. Likewise, the house bill, which became Ch. 59-994, was also in the governor's office at adjournment so that the same constitutional provision became applicable. This bill was filed in the office of the secretary of state on June 19, 1959.

Section 28, Art. III, State Const., provides in part that, "If the legislature, by its final adjournment prevent such action (veto within five days), such bill shall be a law, unless the Governor within twenty days after the adjournment, shall file such bill with his objections thereto, in the office of the Secretary of State . . ." Under this same section it is provided that if the governor approves the bill presented to him "he shall sign it. . . ." His only method of evidencing approval is by his signature. Although the governor is not expressly prohibited from sending any of the bills presented to him by the legislature, which he desires neither to approve by his signature or veto, such sending of the bills to the secretary of state is not an approval within the purview of the constitutional provision. The 20 day period will continue to run notwithstanding his sending it to the office of the secretary of state prior to the running of the 20 day period. Although not exactly in point, see the cases of *State v. Bledsoe*, 159 Fla. 243, 31 So. 2d 457 and *Croissant v. DeSoto Improvement Co.*, 87 Fla. 530, 101 So. 37. This answers question 2; the filing of the bill in the office of the secretary of state, prior to the running of the 20 day period, is not an approval and the 20 day period will continue to run until its termination when the act will become a law. As the legislature adjourned on June 5, 1959, both Chs. 59-994 and 59-1977 became laws on June 25, 1959, not on the date they were filed in the office of the secretary of state.

From the above and foregoing it would be our thought that if the extension of the municipality was not until "around the middle of November, 1959" then it did not affect the boundaries of the water control district as of its creation, which was pursuant to Ch. 59-994. However, if the extension of the municipal limits was pursuant to Ch. 59-1977 above mentioned, then both

chapters 59-994 and 59-1977 became laws at the same moment of time (the expiration of the above 20 day period) so that the legislature is presumed to have been fully cognizant of both acts. If this was the case, we feel that the boundary extension described in Ch. 59-1977 should be excluded from the water control district. This because, for all intents and purposes, the extension of the municipal limits was complete when the water district was organized.

059-271—December 21, 1959

### COURTS

#### JUSTICE OF THE PEACE—AUTHORIZED FEES IN CONNECTION WITH BONDS—§30.23, F. S.

To: *S. E. Locke, Justice of the Peace, Crestview*

#### QUESTION:

**When a justice of the peace sets and collects a cash bond from a defendant and later orders the estreature of said bond and pays same into the fine and forfeiture fund, is the justice of the peace entitled to a fee therefor under §30.23, F. S.?**

Section 30.23, F. S., provides that fees to be charged by "sheriffs and constables of the state" shall be as set forth in that section. There is nothing in this section of Florida Statutes which would authorize a justice of the peace to collect the fees provided for therein and I am unable to find any section of Florida Statutes, which, by reference, would authorize a justice of the peace to collect the fees provided for in §30.23.

Although the specific question which you asked is answered in the negative, there are fees which a justice of the peace may charge in a case where there is an estreature of an appearance bond. The auditing department advises me that it has a resident auditor in your area, Mr. Henry A. Carter, P. O. Box 382, Crestview, Florida, who would be happy to discuss with you the fees which may be charged by the justice of the peace in such a case.

059-272—December 22, 1959

#### REGULATION OF TRADE, COMMERCE AND INVESTMENTS MORTGAGE BROKERAGE ACT—LICENSES OF SOLICITORS AND BROKERS—(CH. 59-309, CH. 494, F. S.) §494.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are mortgage solicitors, under the mortgage brokerage act (Ch. 59-309) of this state, required to obtain licenses separate from that required to mortgage brokers, under whom they serve, or is only the mortgage broker's license required?**

*No person shall act as a mortgage broker or mortgage solicitor without a license therefor as provided in chapter 59-309, acts of 1959. "Application for license as mortgage solicitor must be accompanied by the recommendation of the mortgage broker who is to be applicant's employer and who is to be responsible for applicant's actions." The original mortgage solicitor's license under this act is \$15, and renewals \$10. The broker's license is \$25 for the original,*

and \$15 for the renewal. The licenses of both the broker and that of the solicitor must be displayed in the broker's office. Upon a solicitor's leaving the employment of the broker, the broker is required to return the solicitor's license for cancellation. A "mortgage solicitor" is defined as any individual not licensed as a mortgage broker who performs any of the functions set out in §2(c), Ch. 59-309, and who is employed by a mortgage broker or whose business policies are under the direction of a mortgage broker (§2, Ch. 59-309).

The above stated question is answered in the affirmative.

059-273—December 23, 1959

### PUBLIC MONEY

COST AND EXPENSE OF STATE IN ADMINISTERING SPECIAL FUNDS, DEDUCTION THEREFOR—§§208.08, 208.44, 215.20-215.25; 215.30-215.37, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

### QUESTIONS:

1. Are all accounts within the state agencies fund, the general inspection fund, the state road fund and the trust fund (§§215.30 to 215.37, F. S.), which receive all their revenue from other than the general revenue fund or from federal funds, subject to the 3% service charge mentioned in §215.20, F. S.?

2. If question 1 is answered in the negative, what basis is to be used in determining which accounts should be required to pay this service charge?

3. If an agency collects the major part of its revenue from state license taxes and the minor part thereof from the federal government, should it be required to pay this service charge?

Section 215.20, F. S., was derived from Ch. 20890, 1941, (now appearing as §§215.20-215.25, F. S.), the intent and purpose of which, in so far as here material, being expressed in §1 thereof, the same being the preamble to said enactment, as follows:

THAT, The expense of General Government is paid, with negligible exceptions, out of the General Revenue Fund and expense of other branches of government and activities related to government are paid or intended to be paid out of Special Funds with no contribution heretofore provided to be made to the General Revenue Fund; and

THAT, Special Funds impose expense upon the office of the Comptroller and the office of the State Treasurer in the handling of moneys comprising such Special Funds and in accounting for the same, and impose expense upon other offices and departments of General Government on account of services rendered to Special Funds, which said departments of General Government are supported out of General Revenue and the expense of services rendered on behalf of Special Funds creates an additional drain against the General Revenue Fund; and

THAT, The general taxpayers of the State of Florida should be protected against further depletion of their moneys which are paid into the General Fund for general State operating expense but used for governmental protection,



aid, supervision and assistance of the Special Funds and the activities supported thereby; and

THAT, The minimum cost of State aid and services given to each of these Special Funds and the activities supported thereby from the General Revenue Fund is 3% of the total sums collected by or deposited with either the Comptroller or the State Treasurer, and that means should be effectuated to eliminate this unfair drain on the General Revenue Fund for the benefit of these Special Funds, and that sums should be provided out of which expense for aid and for services rendered in behalf of Special Funds may be met.

From the above and foregoing preamble appears the purposes and reason for §§215.20-215.25, F. S., among which is included the relieving of the general revenue fund of the costs and expenses of the administration of the so-called special funds of the state. The special funds, under this statute, contribute 3% of such funds passing through such special accounts. The special accounts, under the said 1941 enactment, now §§215.20-215.25, F. S., are largely set out in §215.22, with the additional provision that such enumeration is not all inclusive and is not to be considered as "eliminating other special funds" within the purview of the statute. No attempt is here made to make an exhaustive listing of such special funds.

Under §215.24, F. S., where any such special fund contains federal contributions, either by the matching of funds or by a general donation to state funds, and the payment of contributions, by said fund into the general revenue fund, under and pursuant to §215.20, et seq., will cause the said fund to lose such federal assistance such special fund is entitled to exemption from contributions as aforesaid; provided, however, before such exemption may be recognized the provisions of said §215.24 must be complied with. The contributions should be made by the special fund to the general revenue fund unless and until the governor ascertains the facts, as required by said §215.24, entitled the fund to the exemption and has made the certificate to the comptroller as required by the said section.

We next consider the effect, if any, of §215.37, F. S., upon §§215.20-215.25, F. S. In §215.37(1), are listed several of the so-called minor regulatory boards, several of which boards are also listed as coming within §§215.20-215.25, F. S., and required to make the 3% contributions to the general revenue fund as therein provided. Under §215.37(5), "each (minor regulatory) board shall be charged ten percent of all collections made and credited to its account in the agency's fund. The amount so charged shall be deposited in the general revenue fund." This provision for deductions found in said §215.37, F. S., poses the question of whether both the 3% and the 10% deductions are to be made from such minor regulatory board accounts. Sections 215.20-215.25 were derived from an act of 1941, while §215.37 was derived from the acts of 1953; it was amended in 1957 and 1959 in minor detail, however, the above quoted provisions for the 10% deductions originated in the 1953 enactment. The 10% deduction under the 1953 enactment and the 3% deduction under the 1941 enactment appear to have been intended for the same purpose so that there is a conflict between the 1941 and the 1953 provisions, with the 1953 provision

controlling (Hillsborough County Commissioners v. Jackson, 58 Fla. 210, 50 So. 423, text 424, 138 A. S. R. 110, 19 Ann. Cas. 148; Lykes Bros. Inc. v. Bigby, 155 Fla. 580, 21 So. 2d 37, text 39; State v. Webb, Fla., 49 So. 2d 93, text 94).

Specific mention is made in question 1 concerning the state agencies fund, the general inspection fund, the state road fund and the trust fund. The general inspection fund is specifically included in the list of funds mentioned in §215.22 to which §§215.20-215.25, F. S., are applicable. Although the state road fund is not mentioned in said §215.22, specific mention is made of the "gasoline tax collection fund." We find in the statutes and laws no specific mention of a "gasoline tax collection fund," however, beginning with Ch. 9120, 1923, gasoline taxes when collected are paid into the state treasury to be credited to certain specified funds. This rule is still applicable under §§208.08 and 208.44, F. S. The gasoline taxes collected and paid into the state treasury, for allocation as provided by the statutes, doubtless were intended by the reference in said §215.22, to the gasoline tax collection fund, which funds are distributed as provided in §208.08, F. S. We presume that the reference to the "state road fund" in your request for opinion referred to the "state road license fund," and if so, such fund may be said to be derived from the gasoline tax collection fund, mentioned in §215.22 and within said section and subject to the deduction mentioned in §215.20, unless deducted from the gasoline tax funds when paid into the state treasury.

The state agencies fund, as defined in §§215.20 and 215.32, F. S., relates to taxes collected for the operation of "regulatory boards, commissions or other similar agencies or for a specific purpose of such agency." The major portion of such regulatory boards, commissions and agencies are specifically mentioned in §§215.22 and 215.37, F. S., and subjected to the deductions therein mentioned. It must be remembered that the classification of boards, commissions and agencies mentioned in §§215.20-215.25, were made prior to the division of all funds in the state treasury into six groups or funds, and are divided into numerous accounts in each such fund. The classification of funds under §§215.30-215.36, makes no change in the classifications made under §§215.20-215.25, and applies to them, if still within the purview of said sections, without regard to the fund classification under §§215.30-215.36, F. S. Trust funds, as defined in §§215.30-215.36, may generally be said not to be subject to the deductions mentioned; however, should any of them be within the purview of §§215.20-215.25 or §215.37, they would be subject to the tax in that the reclassification of accounts by §§215.30-215.36, was never intended to repeal the classification contained in §§215.20-215.25.

Generally, it may be assumed that legislative intent, by reason of §§215.20-215.25, F. S., anticipates that the service charges thereunder are to be deemed normal administrative expenses and should be paid as such. The provision in §215.20, F. S., that "the deduction shall be based on the *total sum collected for such fund* . . ." (emphasis supplied) seems to merit some consideration especially as to grants, donations, sale of revenue certificates or investments, employee contributions and refunds and transfers, which the legislature doubtless did not intend to include by the reference to *the total sum collected for such fund*. It would seem reasonable to suppose that the legislature had in mind taxes, licenses, regula-

tory fees and miscellaneous revenue and income received by the agency in question. Notwithstanding the wording of said §215.20, it appears that the service charge to be collected should be made only on fees, licenses, taxes and miscellaneous revenue (such as interest, rentals, penalties, etc.). Revenue or funds classified as grants, donations, sale of revenue certificates or investments, employee contributions and refunds and transfers should be excluded.

The above statutes, authorities and observations answer question 1 as well as a general answer may be made thereto.

As to question 2, about all that may be said is that the general rules of classification are contained in §§215.20-215.25 and 215.37, F. S.; the listing of boards, commissions and agencies, in §§215.22 and 215.37, merely list certain boards, commissions and agencies considered to be within the definition, however, other boards, commissions and agencies, within the general definitions, are also included whether created, established or adopted prior or subsequent to such statutes.

Question 3 seems to be answered by §215.24; such trust funds are subject to the deductions mentioned in §§215.20-215.25 and 215.37, when within such statutes, unless the deductions bring them within the purview of §215.24, and they are exempt by reason of said section; provided further, that the requirements of the statutes are followed and the governor's certificate therein mentioned is made and delivered to the state comptroller.

059-274—December 28, 1959

#### TAXATION

RETAIL INSTALLMENT SALES—DOCUMENTARY STAMP  
TAXES—WRITTEN OBLIGATION TO PAY—§§520.30-  
520.42, 201.02, 201.04, 201.05 AND 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Do the written documents made, executed and delivered in connection with transactions under the retail installment sales law (§§520.30-520.42, F. S.) constitute written obligations to pay money within the purview of §201.08, F. S.?

2. What are "written obligations to pay money" within the purview of §201.08, F. S.?

3. Are documentary stamp taxes, under §201.08, F. S., due and payable on promissory notes, written obligations to pay money, etc., when the obligation or indebtedness is less than \$100?

4. Where retail installment sales contracts are within the purview of §201.08, F. S., is the tax on each separate account, upon the several accounts of any person having two or more accounts, or on all the accounts of each dealer, seller, etc.?

5. When will a retail installment revolving account contract or agreement be subject to taxation under §201.08 (2), F. S.?

The retail installment sales law (Ch. 59-414; §§520.30-520.42, F. S.) was designed to regulate the "sale of certain goods in retail installment transactions, including the regulation of retail install-

ment contracts and revolving accounts," in this state. Primarily, this opinion is concerned with the question of documentary stamp taxes imposed pursuant to §201.08, F. S., upon retail installment contracts and retail installment revolving accounts. Under the retail installment sales law, transactions are divided into retail installment contracts and retail installment revolving accounts.

Retail installment contracts are based on one or more purchases made at or near the same time and evidenced by a written contract evidencing such purchases and containing a written obligation to pay the purchase price of such purchases, the amount of which is fixed and stated in such contracts. These contracts appear to be within the purview of §201.08(1), F. S., upon which the amount of taxes may be determined from the face of the instrument and no proof of facts outside of the instrument itself is necessary to fix the amount of the tax. However, that is not the case where purchases are made pursuant to a retail installment revolving account within contemplation of the retail installment sales law.

"*Revolving accounts*," within the purview of the retail installment sales law, "means an instrument or instruments prescribing the terms of retail installment transactions which may be made *thereafter* from time to time pursuant thereto, under which the buyer's total unpaid balance thereunder, whenever incurred, is payable in installments over a period of time and under the terms of which a time price differential is to be computed in relation to the buyer's unpaid balance from time to time." These retail installment revolving account contracts are in fact *credit arrangements* made to govern future purchases over a period of time, so that when a purchase is made the amount payable, under the "promise to pay money contained" in the written instruments making up the revolving account contract, will be increased. Such an agreement or contract is not a direct obligation to pay a fixed sum, or a sum determinable as of the date of the making of the contract, but are executory agreements to purchase goods, wares, merchandise or services, (see §520.31(1), F. S.), when and as desired by the purchaser.

This type of agreement appears to be a mere commercial convenience. The amount of the documentary stamp taxes may not be determined *at the time of the making, execution and delivery* of the agreement or contract. If such agreements or contracts are to be taxed under section 201.08, Florida Statutes, they must be taxed as and when the purchases are made pursuant to such contracts or agreements, unless they fall within subsection (2) of said section.

This requires a construction of §201.08, F. S., as applied to purchases made subsequent to the establishment of a retail installment revolving account under the retail installment sales law, whereby the obligation to pay money will be increased whenever subsequent purchases are made. "The documentary stamp tax is an excise tax on the promise to pay." (*Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, text 416). This case involved a promissory note. However, the instrument involved in *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, text 444, was one for the purchase of advertising in a newspaper *as and when needed*, and the advertising was payable under the contract when furnished, and not by installments, yet the instrument was nevertheless a written obligation to pay money as and when the adver-



tising was furnished, although not in installments as under the retail installment revolving account plan. The court, in holding this contract for advertising service as not within §201.08, F. S., prior to the 1953 amendment adding subsection (2) thereto, stated that such contract for advertising amounted "to nothing more than an executory agreement to purchase advertising space, the amount of which is uncertain, and no obligation to pay arises until the advertising is run." In this case the court further stated that "in *United States v. Isham* (17 Wall. 496, 21 L. ed. 728), it was held that the liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself. This doctrine applies with peculiar force to the instrument in question. From its face money may or may not become due under it. If it becomes due no one can tell how much or when it will become due. It does not fix a debt and promise to pay it. It is not a direct obligation to pay money, but it is an executory agreement to take advertising space, if desired, on the conditions mentioned."

In *Lee v. Kenan*, CCA Fla., 78 Fed. 2d 425, 100 C. L. R. 869, the court had before it an agreement between the city of Jacksonville and the receivers of the Florida East Coast railway company, for the sale and purchase of electricity, the same to be paid for as used, concerning which agreement the court said (text 426) that the said agreement was "not a written obligation to pay money within the meaning of the statute" but that it was "only an executory agreement for the sale of a commodity, and no obligation to pay money arises under it unless and until the commodity is delivered. The city could recover no money of the receivers by merely pleading and proving this contract, but would have to allege and prove the delivery of a certain amount of electric current and the adjustment of the price. . . . This contract on its face is not a direct obligation to pay money, but one to take electric current on certain conditions. On doing that, an obligation to pay money will arise. No one can tell from the face of this paper what amount of money, if any, will become due under it. If one should at its execution attempt to stamp it, he could not tell what amount of stamps should be affixed. . . ." This agreement was held not to be within the purview of §201.08, F. S., prior to the 1953 amendment adding subsection (2) thereto.

It was stated in *Lee v. Kenan*, supra, that "an obligation to pay money usually refers to a direct written promise to pay a stated sum and not to the duty to pay that which may be established by proof of extrinsic facts." In *Metropolis Pub. Co. v. Lee*, supra, the court, quoting from *U. S. v. Isham*, supra, said that "the liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself." The Florida court, in *Metropolis Pub. Co. v. Lee*, supra, announced the same rule.

The U. S. supreme court, in *Lederer v. Fidelity Trust Co.*, 267 U. S. 17, 45 S. Ct. 206, 69 L. ed. 494, text 495, remarked that "whatever upon its face (the instrument) purports to be, that it is for the purpose of ascertaining the stamp duty." In *Hamilton Nat. Bank v. U. S.*, CCA Tenn., Fed. 2d 570, text 573, the court, concerning the federal stamp tax on corporate securities, remarked that "the tax is levied not upon a profit, but upon the document

itself, if it comes within the statutory definition." *Willcuts v. Investors' Syndicate*, CCA Minn., 57 Fed. 2d 811, text 813, involved a federal documentary stamp tax on bonds, debentures or certificates of indebtedness issued by corporations, concerning which the court stated that "as respects this kind of taxes, the liability to pay a stamp duty, as well as the amount, is to be determined by the form and face of the instrument." See also *Motter v. Bankers Mtg. Co.* CCA Kan., 93 Fed. 2d 778, text 780, and *Phila. v. Goldfine*, S. Ct. Pa., 29 A. 2d 233, text 234. *DeVore v. Lee*, 158 Fla. 608, 30 So. 2d 924; *DeVore v. Gay*, Fla. 39 So. 2d 796; and *Dundee Corp. v. Lee*, 156 Fla. 699, 24 So. 2d 234, appear to hold that the tax on leases of real property, even if they be considered as written obligations to pay money, are to be taxed on their value at the time of execution, not on the value of all payments that may accrue under the lease if it remains in force for its full term.

Revolving accounts described in §520.35, F. S., are not within themselves written obligations for the payment of a sum certain; the contract is one to pay for any goods, wares or merchandise purchased or received under the contracts in the manner provided by such contracts. No one may determine from the face of such contracts what amount of money, if any, will be due and payable thereunder at any given date. Should one, at the time of execution, attempt to stamp it, he could not determine the amount of stamps to affix (See *Lee v. Kenan*, and *Metropolis Pub. Co. v. Lee*, supra). Only by proof of facts outside of the agreement itself may the tax be determined, if at all. Section 201.08 (1), F. S., applies as of the date of the making, execution and delivery of an instrument. It seems evident that the adoption of §201.08 (2), was for the purpose of adopting another rule as to the documents and instruments therein described. If successive purchases under a revolving contract were subject to successive documentary tax levies, to be made upon each purchase, then there would appear to be no reason for the enactment of said subsection (2). In *Culbreath v. Reid*, Fla., 65 So. 2d 556, it was held that the documentary stamp taxes upon a deed of conveyance is the *actual monetary consideration paid*.

The Florida documentary stamp taxing statutes, as to the documents embraced in §201.08, are excise taxes on the promise to pay, not on purchases made subsequent to but pursuant to such documents, except to the extent embraced in subsection (2) of said section. Under subsection (1) of said section the taxes are due upon the execution and delivery of the contract; *while under subsection (2) of said section the taxes are determined and paid quarterly*. Retail installment contracts, under §520.35, F. S., are written obligations for the payment of money, and within the purview of §201.08, F. S.; such as come within the purview of subsection (1) being taxable at the rate mentioned in said subsection upon the enforceable obligation existing thereunder *at the time of their execution and delivery*; however, as to such contracts as may be within the purview of subsection (2) the taxes are payable in accordance therewith. Nevertheless, where the revolving account requires or contemplates the signature of the purchaser, or a sales slip, receipt, or other document, in addition to the execution of the revolving account itself such additional requirement would, at least in some instances, raise a separate contract composed of the revolving contract and the required signature of the purchaser. Although a revolving account may not, at the time of its execution, have any determin-

able fixed obligation to pay money, it does constitute a document within the purview of §201.08, *requiring at least a 10c stamp under the rule announced in State v. Cook*, 108 Fla. 157, 146 So. 223, and *Nelson v. Watson*, 114 Fla. 806, 155 So. 101.

Because of the language used in §201.08, F. S., assessing a tax on "each one hundred dollars of the indebtedness or obligations evidenced" by promissory notes, written obligations to pay money, etc., it was the rule, prior to the last above mentioned cases, that only those notes and written obligations in excess of \$100 were taxable and those having an obligation less than \$100 were not subject to the tax. However, in *State v. Cook*, an assignment of wages was subject to a 10c tax although involving less than \$100; in *Nelson v. Watson*, a written obligation to pay the sum of \$3.50, in connection with the purchase of a chair, was held subject to a 10c tax.

We gather from *Metropolis Pub. Co. v. Lee*, supra, *Lee v. Kenan*, and other cases involving §201.08, F. S., that the phrase "written obligations to pay money" therein mentioned contemplates written documents which would constitute documentary evidence sufficient to prove the obligation in question in court, similar to the use of a promissory note to prove the obligation of the maker. Such written obligations may be composed of two or more documents, letters, or other things which together compose a written promise to pay. The documents required under §520.35, F. S., for retail installment revolving accounts, would seem to comprise a "retail charge account service" within the purview of §201.08 (2), F. S., in so far as they may be "in connection with sales made under retail charge account service (revolving account) incident to sales *which are not conditional in character and which are not secured by mortgage or pledge of the purchaser*. The legislature recognized in the retail installment sales law that sales "conditional in character, and which are not secured by mortgage or pledge" may be made. This is borne out by §520.31 (10) where reference is made to fees for filing, recording or otherwise perfecting, releasing or satisfying any *title or lien retained* or taken by seller in connection with a retail installment transaction. Reference is also made in §520.38 to "goods if repossessed." This raises doubt as to the application of §201.08 (2) to purchases under revolving accounts as to any of the purchases thereunder which are conditional in character and which are secured by mortgage or other lien of the purchaser.

The documentary stamp taxes imposed by Ch. 201, F. S., are imposed with respect to the documents and instruments themselves. The tax is imposed on deeds, instruments and writings, under §201.02, on sales and agreements to sell, under §201.04, the transfer and issuance of capital stock, under §§201.04 and 201.05, and the promissory notes, nonnegotiable notes, written obligations to pay, etc., under §201.08, although the duty of paying the tax is the obligation of the parties to the instrument. The tax is not imposed either upon the *total* consideration of all the accounts of one person or all the accounts of a retailer or other holder, but upon the instruments composing the contracts themselves.

From the above and foregoing it follows that:

1. The written documents made, executed, and delivered in connection with transactions under the retail installment sales law constitute written obligations to pay money within the purview of §201.08, F. S. The rule for taxing such documents is set out above.

2. Written obligations to pay money, within the purview of §201.08, F. S., are those contracts composed of one or more written instruments which would be admissible in court to support an action for the collection of the sum demanded thereunder.

3. Documentary stamp taxes are due and payable on written obligations to pay money, as well as the other obligations mentioned in §201.08, F. S., whether such obligation is more or less than \$100.

4. The taxes imposed by §201.08, F. S., upon written obligations to pay money, as well as the other documents therein mentioned, are imposed upon the documents composing the written obligation to pay money, and not upon the combined obligations of any one person or any one holder of such documents.

5. Retail installment revolving account contracts or agreements are subject to taxation under §201.08 (2), F. S., when they are incident to sales which *are not conditional in character and which are not secured by mortgage or other pledge* of the purchaser.

059-275—December 28, 1959

**STATE AND UNITED STATES FLAGS**  
DESTRUCTION OF UNSERVICEABLE FLAGS—CH. 256;  
§256.08, F. S.

To: *Mrs. E. W. Speller, Leader, Girl Scout Troop #17, Port Richey*  
QUESTION:

**Is it proper to destroy unserviceable flags by burning, and if so, how should this be accomplished?**

It is the general policy of this office to issue official opinions only to agencies of the state or governmental subdivisions of the state on questions related to their authority, responsibilities and duties.

The question you have presented, however, is in my opinion important and of general public interest. Furthermore, the question is raised by an organization which although private in character renders a significant public service and I therefore believe that it is proper for me to give such advice and information on the subject as may be possible.

I assume that your question is related primarily to the flag of the United States.

I believe, however, that in this regard the flag of the state of Florida should be accorded the same dignity and respect and my remarks are intended to apply both to the flag of the U. S. and to the flag of Florida.

Chapter 256, F. S., prohibits the improper use or public mutilation of the flag and provides a criminal penalty for its violation. Section 256.08, defines flag, standard, color, ensign or shield (as used in this chapter) as including:

. . . any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Public law 829, 77th Congress, Ch. 806, 2nd Session, H. J. R. 359, approved by congress Dec. 22, 1942, amended public law 623 entitled "Joint resolution to codify and emphasize existing rules



and customs pertaining to the display and use of the flag of the United States of America."

Section 4 (J) of this act provides, "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."

Section 8 of this act provides that any rule or custom pertaining to the display of the flag of the U. S. set forth therein may be altered, modified or repealed, or additional rules with respect thereto may be prescribed by the commander-in-chief of the army and navy of the U. S., "whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation."

The above provision relating to the destruction of flags has been considered by the national Americanism commission of the American Legion and its official interpretation thereon set forth on p. 17 of its publication, "Let's be Right on Flag Etiquette" as follows, "Unserviceable flags may be destroyed preferably by burning with appropriate public ceremony or privately."

In its manual of ceremonies, adopted by the American Legion in 1921, a complete ceremony for the burning of unserviceable flags is set forth on pp. 57-60. This ceremony is held out of doors, at night. After appropriate statements by officers of the American Legion post and prayer by the chaplain, ". . . members of the Flag Detail dip the condemned flags in kerosene and place them on a rack over the fire. Bugler sounds 'To the Colors.'"

I find no reference to a severance of the blue field from the stripes before the flag is burned in this ceremony which has been adopted by the American Legion. I believe this particular form of ceremony is acceptable to the various branches of the armed forces and assume that a copy of this ceremony could be obtained from your local American Legion post.

Summarizing the above, it is my opinion that unserviceable flags of either the U. S. or of Florida which are no longer fitting emblems for display, should be destroyed in a dignified way, preferably by burning.

The act of burning unserviceable flags may be carried out at any time, either in public or private, but must be done in a dignified and respectful manner suitable to the occasion and to the organization or persons charged with this responsibility.

059-276—December 29, 1959

#### GROUP INSURANCE

PAYMENT OF PREMIUMS FOR GOVERNMENT EMPLOYEES FROM PUBLIC FUNDS—CHS. 20473 AND 20852 (§§112.08-112.14, F. S.), 1941; §112.15, F. S. (REPEALED, 1951.)

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### QUESTION:

Under the existing law may the Dade county board of public instruction participate in a group life insurance, health and accident insurance plan for teachers and expend public funds toward paying a portion of the premiums on such policy or policies?

Chapter 20473, 1941, which was approved by the governor May

26, 1941, and filed in the office of the secretary of state May 27, 1941, provides in part:

Section 1. That the several Boards of Public Instruction in Counties having a population of not less than 200,000 of the State of Florida be, and they are hereby empowered and authorized to set up, adopt and provide a plan in each County for group insurance for the teachers and other persons necessary to the operation of the public schools of such County, . . .

Section 2. In each County where a plan for group insurance, as provided above, has been adopted, the Board of Public Instruction of said County is hereby authorized and empowered, from any available funds to contribute to the premiums necessary to carry out such group insurance.

A few days later during the same legislative session Ch. 20852 was passed, approved by the governor on June 12 and filed in the office of the secretary of state on June 12, 1941. This law provides in part:

Section 1. That from and after the passage of this Act, each and every county, county board of public instruction, governmental unit, department, board, or bureau, of the State of Florida, be, and each of them is hereby authorized, empowered and permitted to provide for life, health, accident, hospitalization or annuity insurance, or all of any kinds of such insurance, for the employees thereof, upon a group insurance plan, . . .

Section 5A of this act from which §112.12, F. S., is derived provides:

Provided that in event any School Board should include School Teachers under any policy provided for by this Act, then no part of the premium therefor as to such teachers shall be paid from any public funds.

Section 7 of the act provides in part:

All laws and parts of laws in conflict with this Act are hereby repealed, provided, however, that nothing in this Act shall restrict or repeal the operation of any special or local laws authorizing the participation in group insurance by any departments, state agencies, boards of public instruction, or governmental units of the State of Florida.

In resolving the question presented herein, we must consider whether the first passed law, Ch. 20473, which authorizes the expenditure of public school funds to pay insurance premiums, falls within the classification of a special or local law and as such is expressly unaffected by §7 above, or if it is in fact a general law and therefore, if determined to be in conflict with Ch. 20852, expressly repealed.

A law may be a general law even though applicable to only a portion of the state. The test of the validity of a statute classifying counties by population is the reasonableness of the basis for the classification or the relationship between classification and the object sought to be accomplished (*Lindsay v. City of Miami*, 52 So. 2d 111). The fact that only one county is immediately affected by a population act does not mean that the act is necessarily a special or local law, particularly if it is potentially applicable to other counties (*Board of Public Instr. of Pinellas County v. County Budget Comm. in and for Pinellas County*, 90 So. 2d 707).

In the instant situation it seems clear that *Ch. 20473 as a population act comes within the above referred to criteria of a general law and is not a special or local law in fact or application.*

Proceeding on the assumption that *Ch. 20473* is a general law, it is next necessary to determine whether said act is in conflict with *Ch. 20852*. Although both laws were passed at the same session of the legislature, the salient points of each differ greatly. *Ch. 20473*, the population act, authorizes the payment of group insurance premiums for school personnel with public funds. Chapter 20852, enacted shortly thereafter, prohibited the use of public funds for the payment of such premiums.

It is a well settled rule of statutory construction that where the legislature has enacted different acts on the same subject, passed at the same session, that if the courts can by any fair, strict, or liberal construction find for the two provisions a reasonable field of operation without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so (*Tamiami Trail Tours v. City of Tampa*, 31 So. 2d 468). By the same token, laws passed at the same session of the legislature will be considered in *pari materia* and will be construed so that each will be effective if that is possible, but where they are repugnant, the last one enacted will control (*Provident Life and Accident Ins. Co. of Chattanooga, Tenn. v. Mathers*, 26 So. 2d 814).

In construing the two laws herein, it is difficult to see how they can stand side by side, one providing for the expenditure of public funds and the other which prohibits such use, and expressly repeals all laws in conflict therewith. Inasmuch as the two are apparently not reconcilable, it seems that we must look to the latest expression of legislative intent.

Therefore, it is my opinion that *Ch. 20852* expressly repealed *Ch. 20473* with the resulting effect that no statutory authority now exists for the use of public funds for the purpose requested.

Accordingly, your specific question is answered in the negative.

060-1—January 6, 1960

**COUNTY SCHOOL SYSTEM  
BOARD OF PUBLIC INSTRUCTION—LIMITATION ON  
NUMBER OF MEETINGS, MILEAGE—§230.201,  
F. S. AND CH. 28834, 1953**

To: *Bryan Willis, State Auditor, Tallahassee*

**QUESTION:**

**Does the limitation in §230.201, F. S., as to the number of meetings for which reimbursement for mileage is payable to members of county boards of public instruction apply to the mileage provided for such members by *Ch. 28834, 1953*?**

Chapter 28834, 1953, is a population act relating to the salaries of members of boards of public instruction in counties having a population of 20,200 through 23,000. The act also provides reimbursement to members of the board for traveling expenses to and from meetings. Said chapter *does not* contain any limitation as to the number of meetings for which this mileage is payable.

Generally, population acts are regarded as general laws and

not as special or local laws even though at the time of enactment it may be applicable to only one political subdivision of the state (State ex rel Baldwin v. Coleman, 148 Fla. 155, 3 So. 2d 802; Board of Public Instr. v. County Budget Comm., 90 So. 2d 707; State v. Board of Pub. Instr., 113 So. 2d 368, 369).

Section 230.201, F. S., relates to substantially the same subject matter contained in Ch. 28834, supra. However, in §230.201, supra, there is a limitation as to the number of meetings for which reimbursement for mileage is payable:

... provided, such allowance shall not be made for more than nine meetings in the first half and nine meetings in the second half of any one fiscal year in counties having a population of less than 80,000. . . . (Emphasis supplied.)

It has generally been stated that all acts relating to the same subject matter or having the same general purpose may be read together as constituting one law (Amos v. Conkling, 99 Fla. 206, 126 So. 283). Since Ch. 28834, supra, and §230.201, supra, both relate to the compensation and mileage payable to members of the county school boards, they should be read together so that the limitation appearing in §230.201, supra, should apply to Ch. 28834, supra.

It is interesting to note that the limitation contained in §230.201, supra, not only was in existence prior to the passage of Ch. 28834, supra, in 1953, but such limitation was subsequently re-enacted after 1953 when §230.201, supra, was amended (See §25, Ch. 29754, and §37, Ch. 29764, 1955; §4 of Ch. 57-249).

In ascertaining the legislative intent, the courts will consider the history of the act, the evil to be corrected, the purpose of enactment, *and the law then in existence bearing on the same subject* (State Board of Accountancy v. Webb, 51 So. 2d 296). (Emphasis supplied.)

The passage of Ch. 28834, supra, in 1953 and the legislative re-enactment of the limitation contained in §230.201, supra, subsequent to 1953 apparently indicates that the legislature intended that the limitation should still apply to all counties having a population of less than 80,000 inhabitants. In this regard it is stated:

The last expression of the legislative will is the law, and, in case of conflicting provisions in the same statute or different statutes, the last in point of time or order of arrangement prevails (Johnson v. State, 157 Fla. 685, 27 So. 2d 276).

In light of the above statements, I am of the opinion that the limitation in §230.201, F. S., as to the number of meetings for which mileage is payable to members of county boards of public instruction applies to those county boards of public instruction within the population brackets of Ch. 28834, 1953.

Your question is therefore answered in the affirmative.



060-2—January 7, 1960

## COURTS

## JUVENILE COURT—TEMPORARY AND PERMANENT SEVERANCE OF PARENTAL RIGHTS—CH. 39; §§ 39.02 AND 39.11, F. S.

To: *W. R. Culbreath, Judge, Juvenile and Domestic Relations Court, Miami*

## QUESTIONS:

1. Does the juvenile court under Ch. 39, F. S., have the authority to cut off permanent parental rights, without at the same time permanently committing the child to a licensed child placing agency for subsequent adoption?

2. If the child is 16 or 16½ years old, which makes it extremely difficult to find an adoptive home and no licensed agency will accept them for adoptive placement, does the juvenile court have the authority to permanently sever the rights of the parents and never commit the child to anyone?

3. Does the juvenile court of Dade county, which enters an order temporarily committing a dependent or delinquent child to the Dade county detention home and reserves jurisdiction to enter further orders in the future, have the authority to permanently commit such child to a licensed child placing agency without giving notice to the parents?

Section 39.11, F. S., provides for the powers of the juvenile court with reference to the commitment of dependent and delinquent children. Section 39.11(1)(a) and (b) provides for the temporary commitment of such a child, as subsection (3) thereof provides that "any order made pursuant to subsections (1)(a) or (1)(b), may thereafter be modified or set aside by the juvenile court."

Section 39.11(1)(c), and (3), F. S., provides for commitment for an indeterminate period to an industrial school.

The rest of §39.11, F. S. (except subsection (6)), deals with the matter of *permanent commitment* of a dependent or delinquent child to a licensed child placing agency for subsequent adoption, which after the entry of such order the juvenile court shall no longer exercise jurisdiction over the child. In such proceedings particular emphasis is placed on the matter of *notice* being given the known living parents and legal custodians of the child.

I understand that your main concern is the matter of giving notice to the parent even though it may necessitate the holding of a second hearing before permanently severing the parental rights. In this regard, I believe the supreme court of Florida has very clearly construed §39.11, F. S., in the case of *Noeling v. State*, 87 So. 2d 593, with reference to the question you present, relative to notice to the parents.

In *Noeling v. State*, supra, the facts were as follows:

On April 28, 1955, the Juvenile Judge entered an order that the child was dependent and committed her "to the care, custody and control" of a licensed child placing agency. This order did not permanently commit the baby

to the institution for subsequent adoption but the court did retain jurisdiction of the cause and the child for the purpose of making other and further orders "as may from time to time be necessary." There was no appeal from the order of April 28, 1955.

On May 31, 1955, the Juvenile Judge entered another order apparently without further hearing in which he again found the child to be dependent and stated that prior to the making of this order, the mother and father had gone to New Jersey and that the child "is hereby permanently committed to the Children's Home Society of Florida for subsequent adoption." The order recited that the attorney for the parents "specifically waived notice of the appearance of the parents before the Court this day." On appeal to the Circuit Court, this order of May 31, 1955, was reversed for lack of adequate findings of fact.

Thereafter, on September 21, 1955, the Juvenile Judge entered an order of compliance with the mandate from the Circuit Court in which he recited briefly the facts on which he based his conclusion and then reaffirmed the previous order permanently committing the baby to the Children's Home Society for subsequent adoption. The order of the Juvenile Court of September 21, 1955, was appealed to the Circuit Court and on December 1, 1955, the Circuit Judge affirmed the same. It is this order of the Juvenile Court, dated September 21, 1955, and the affirming order of the Circuit Court, dated December 1, 1955, which are submitted to this court for review in the instant proceeding. (Emphasis supplied.)

The supreme court found that the juvenile judge had substantial competent evidence upon which to base his conclusion that the child was dependent, and therefore the scope of the review of the case by the supreme court was limited to a determination as to whether the aspect of the order which permanently committed the child for subsequent adoption reflects a departure from the essential requirements of the law because of the failure of the juvenile court to notify the parents of the infant that the petition for permanent commitment had been filed and by such notice direct the parents "to show cause why the petition should not be granted" as required by §39.11(4) (a), (b) and (c), F. S.

In *Noeling v. State*, supra, on p. 597 of 87 So. 2d, our court said:

Without quoting in detail the provisions of Section 39.11 (4), Florida Statutes, F. S. A., it is sufficient to point out that it is contemplated by this Section that the parents of the child should be specifically notified that the drastic action of depriving them of their natural right to their child is contemplated and that they should have an opportunity to defend against the contemplated action by the State. Personal service is required if possible but constructive service is available if the parents are beyond the jurisdiction.

We revert to a consideration of the procedure as followed in the instant case. The hearing on the original petition was held February 2 and February 7, 1955. At the conclusion of this hearing the Juvenile Judge, on April 28, 1955, entered an order which merely committed the

infant temporarily to the custody of the Children's Home Society. While it is true that by this order, the Judge reserved jurisdiction to enter further orders, we are of the view that due process required that preliminary to the entry of any further order that would have the effect of permanently depriving these petitioners of the custody of their child, they should have been notified as required by the statute or in the alternative that they waive such notice in the manner stipulated by the statute. In the absence of service of notice, the only method by which notice could be waived was that provided by the Act itself. (Emphasis supplied.)

In its concluding remarks, in *Noeling v. State*, supra, the supreme court said:

*Although in the case before us the court might upon further hearing properly come to the conclusion that the unfortunate infant involved should be permanently withdrawn from the custody of the natural parents, we are of the view that due process in the withdrawal procedure require that the parents have a proper opportunity pursuant to notice to defend their parental rights and position. We have not overlooked the fact that the permanent commitment recited that the parents were then out of the state and that their attorney of record waived the notice. However, we are forced to conclude that a waiver by an attorney under such circumstances is not within the general scope of an attorney's authority to waive mere procedural requirements. Involved here was a substantial personal right that could be waived only in the manner provided by law.*

In view of the foregoing we are led to the conclusion that due process of law requires that these parents be given an opportunity to appear again before the Juvenile Judge in defense of their position, if any they have, against the permanent commitment of their child to the custody of the State. (Emphasis supplied.)

The rule of the opinion expressed by our court in *Noeling v. State* has been followed in other states. In the case of *In re Frinzi*, 152 Ohio St. 164, 87 N. E. 2d 583, 588, the supreme court of Ohio pointedly held:

*Because of the relationship between parents and children, and because of the social consequences involved, even though juvenile agencies have undoubtedly made a great contribution to social and community welfare, a Juvenile Court cannot make a valid order changing temporary commitment of a dependent child to a permanent one without a service of notice upon the parent of the child, strictly in accordance with the law.*

(See also 43 C. J. S., Infants, §8, p. 59; *In re Sutton*, 132 W. Va. 875, 53 S. E. 2d 839; *State ex rel Clark v. Allaman*, 154 Ohio St. 296, 95 N. E. 2d 753; *People v. Spiers*, 17 Cal. App. 2d 477, 62 P. 2d 414.) (See p. 598 of 87 So. 2d, *Noeling vs. State*.)

In view of the foregoing, your questions should be answered as follows:

#### AS TO QUESTION 1:

It appears doubtful that the legislature intended that the parental rights be permanently severed without the child being

permanently committed to a child placing agency for subsequent adoption. (See also *Ponce v. Children's Home Society of Florida*, 97 So. 2d 194.) Question 1 is therefore answered in the negative.

Question 2 is answered in the negative, although the juvenile court may assume jurisdiction over a dependent or delinquent child up until the time he is 17 years of age and retain same until he reaches the age of 21 years. (See §39.02, F. S.)

Replying to question 3, it is my opinion that notice must be given or waived as prescribed by statute. Question 3 is answered in the negative.

In regard to your further inquiry regarding remedial legislation, I wish to advise that this office shall be glad to include in its recommendation for legislative changes such remedial legislation in this regard as the juvenile judges association of the state may see fit to propose.

060-3—January 11, 1960

#### TAXATION

#### BONDS OF THE NATIONAL CAPITAL HOUSING AUTHORITY (DISTRICT OF COLUMBIA)—FLORIDA INTANGIBLE TAXES—§199.02(2), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Are bonds issued by the national capital housing authority of the District of Columbia, exempt from Florida intangible taxes?**

For the purposes of this opinion it is presumed that the said bonds would be taxable under the statutes and laws of Florida unless subject to exemption under the statutes and laws of the U. S., or the U. S. Const. Under §8, Clause 17, of Art. I of the federal constitution, congress exercises "exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ." The District of Columbia was ceded to the U. S., by Maryland and Virginia, pursuant to this constitutional provision and was duly accepted by congress.

Circuit Judge Taft (later chief justice of the U. S.) in *Grether v. Wright*, C. C. A. 6th, 75 Fed. 742, text 757, discussing the District of Columbia, stated that "the object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation. . . . The bonds in question were issued to borrow money to pay the debts incurred in the national purpose of improving and beautifying the city of Washington, the capital of the nation. . . . These bonds were, therefore, issued by virtue of the same power which was held to be impeded by state taxation in *Weston v. Charleston* (27 U. S. 449, 7 L. Ed. 481) and in all the cases which have followed its authority. . . ." *Grether v. Wright*, supra, has been cited with approval in *National Mutual Ins. Co. v. Tidewater Trans. Co.*, 337 U. S. 582, text 639, 69 S. Ct. 1173, 93 L. Ed. 1556, text 1593; *O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, text 1365; and *Farmers & Mechanics Savings Bank*



v. Minnesota, 232 U. S. 516, text 521, 34 S. Ct. 354, 58 L. Ed. 706, text 709). These cases hold that the city of Washington, "the object of the grant of exclusive legislation over the" District of Columbia, is "national in the highest sense" and the "city, not of a state, not of a district, but of a nation," a city national in character. It is an agency of the U. S. The city of Washington appears more national than would a city of a territory of the U. S., considered in our opinion of Jan. 30, 1959 (059-19).

Section 199.02(2), F. S., exempts from state taxation "bonds of the United States government and its agencies." The District of Columbia is an agency of the U. S. and appears to be within the purview of said §199.02(2), F. S., and its bonds exempt from state taxation in the absence of specific federal or district authority; no such authority appears from an examination of federal and district legislation.

060-4—January 11, 1960

REGULATION OF TRADE AND COMMERCE  
BANK CHARGE PLAN AGREEMENT—RETAIL INSTALLMENT SALES ACT OF 1959—CH. 59-414, §§520.30-520.42, F. S.  
To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are bank charge plan agreements, like or similar to the one exhibited with your said request for opinion, including the documents used therewith, also exhibited to us, within the purview of the retail installment sales act of Florida?

The so-called bank charge plan agreement, exhibited with your said request for opinion, is in the form of a letter addressed to the bank, by a retail business organization, which is to be expressly accepted by the bank by or through a duly authorized officer or agent, when signed by the parties and delivered will constitute a written agreement between the parties. In and by such an agreement, upon the compliance by the parties of the covenants therein contained, the bank agrees to finance purchases by customers of goods, wares and merchandise from the business organization. From the said agreement it appears that plan of operation will be for the business organization, as seller, to draw a so-called "sales draft" on the financing bank, in the amount of the purchase, and sign or approve the same as drawer, which will then be accepted by the purchaser as acceptor, directing the payment, evidently from the account of the purchaser, the amount of the purchase, to the bank. There is indication in the documents that the customer will or may establish credit with the bank whereby the amount of the draft, after acceptance and payment by the bank, may be paid by installments.

So far as we are able to ascertain from the file, the documents contemplate immediate payment for the merchandise purchased by the bank pursuant to the so-called "sales draft," so that if there is to be any installment payments they will be pursuant to arrangements between the bank and the customer. To all intents and purposes the merchandising transaction, as between the bank and the seller or business organization, is not a retail installment revolving account, neither is there such a transaction between the

seller and the customer; that relation is merely one of a retail sale payable by a demand draft. If there is any revolving account it is a bank account and not a retail account. This arrangement does not appear to be within the definition of a "revolving account" as defined in §520.31(7), F. S. It is not a *retail installment transaction*.

The above stated question is, therefore, answered in the negative; however, we only pass upon the specific documents before us. No attempt has been made to determine the status of the so-called "sales draft," or other documents exhibited with the request for opinion, as promissory notes or other written obligations to pay money.

060-5—January 11, 1960

### PUBLIC MONEY

#### COLLECTION OF MONEYS FROM PARTIES BY COUNTY JUDGES, JUSTICES OF THE PEACE, AND JUDGES OF SMALL CLAIMS COURTS AND COMMINGLING WITH "PUBLIC MONEY" UNDER §219.01(2), F. S.

To: Bryan Willis, State Auditor, Tallahassee

#### QUESTION:

May the money collected from a party by a justice of the peace, county judge, or judge of the small claims court without suit be commingled with the "public money" of his office as defined in §219.01(2), F. S., in absence of specific statutory authority to collect such money?

So far as we are able to ascertain, the general statutes of the state do not authorize a justice of the peace, county judge, or small claims court judge, or the judge of any other court to collect claims and demands of others without suit; and any attempt by any such officer to act as a collection agency must be deemed to be done in his *individual capacity* and not in his official capacity. We find no statute in this state taking justices of the peace, county judges, and small claims court judges out of this rule and find no general statute or rule of law adopting any other rule as to them.

Chapter 219, F. S., relating to the handling of county public money by state and county officials, defines the term "public money" as follows:

(2) The term "public money" shall be taken to mean and include all money collected by a county officer *which he is required or authorized by law, as such county officer, to collect*, and underpayments, overpayments, partial payments and deposits of such money, except his salary when his sole compensation is provided by such salary. (§219.01(2), F. S.) (Emphasis supplied.)

Based upon the clear language of the above definition, the term "public money" refers to only that money which the officer is required or authorized *by law* to collect.

As was hereinabove pointed out, the officers referred to in your inquiry are *neither* required nor authorized by statute to make collections from parties. Therefore, in the event that money is collected from a party, such money would not constitute "public money" within the meaning of §219.01(2), F. S., and could not

be *commingled* with the public money in the office of such officers. Any money heretofore collected should be placed in a fund separate and distinct from the public money and the personal funds of the judicial officer, to be held in trust for the proper party.

Your question is therefore answered in the negative.

060-6—January 11, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
SUPREME COURT JUSTICES, DISTRICT COURT OF APPEAL  
AND CIRCUIT JUDGES RETIREMENT SYSTEM—COMPUTA-  
TION OF TIME—CH. 123, F. S.; §§15 AND 16, ART. V,  
STATE CONST.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**STATEMENT OF FACT:**

Chapter 123, F. S., provides for retirement of members of the judiciary after 10 years of service, upon attaining ages 55 and 60, and for retirement after 20 years service under certain conditions at any age.

Judges are elected for a term of a definite stated number of years. However, in computing the service in the aggregate it is possible for a judge not to have 10 or 20 years in the aggregate due to the fact that the day on which they take office varies with each term and on a strict computation they could be several days short of the 10 or 20 years. This variation would not amount to more than 5 or 10 days.

**QUESTION:**

Based on the above statement of facts should the service be computed on a term basis rather than a day basis?

Sections 15 and 16, Art. V, State Const., have a direct bearing upon your question. They prescribe six-year terms for circuit judges and for judges of the district courts of appeal and the supreme court, the cycles of their election and that their terms of office begin on the first Tuesday after the first Monday in January after their respective elections.

Chapter 123, F. S., providing a retirement system for these judges, does not purport to measure their retirement benefits without regard to their constitutionally prescribed terms. While they do not take office on January 1 of the year after election, nevertheless, in legal contemplation, their six-year terms mean calendar years and the few days of underrun or overrun at the beginning and ending of their terms do not militate against the fact that their six-year terms mean calendar years. Consequently, it is not necessary to compute the aggregate days of a judge's term to ascertain his retirement benefits except for those years when he has served less than a calendar year, as for example when he is appointed during a calendar year or retires during a calendar year.

A year is defined in 86 C. J. S. 832-833, §9, as "a well-known period consisting commonly of three hundred and sixty-five days; . . . and in leap years three hundred and sixty-six; a period of twelve months; twelve calendar months; and indeed, a year, twelve months, fifty-two weeks, and three hundred and sixty-five days, all denote the same total period of time. It is well established both at

common law and by statute that, unless otherwise expressed, the word 'year,' when used in a contract, judicial proceeding, statute, or constitution, ordinarily is understood as meaning a calendar year of three hundred and sixty-five days or of twelve months, and it means a calendar year regardless of whether it be a leap year or otherwise. . . ."

Your question is answered in the affirmative and the computation should be on a term or yearly basis, except, however, service for only part of a year should be computed on a day basis.

060-7—January 12, 1960

### TAXATION

OCCUPATIONAL LICENSES — MORTGAGE SOLICITORS LICENSED UNDER §4, CH. 59-309 (§494.04, F. S.) — §§205.52 AND 205.58, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

### QUESTION:

Are mortgage solicitors, employed by mortgage brokers, under and pursuant to Ch. 59-309, required to obtain occupational licenses under and pursuant to §205.58, or other provision of Ch. 205, F. S.?

Under §4 of Ch. 59-309 (§494.04, F. S.), "no person shall act as a *mortgage Broker* or *mortgage Solicitor* without a license therefor as provided by" said act. (Emphasis supplied.) No such license may be granted until the applicant shall have been a resident of this state for at least six months next preceding the date of application. The application of a mortgage solicitor must be accompanied by the recommendation of a mortgage broker who is to be the applicant's employer "and who is to be responsible for applicant's actions." Original licenses for mortgage brokers, under said §4, is \$25 and renewals \$15; and for mortgage solicitors is \$15 and \$10. The license fees are "appropriated to the Comptroller to be used in administering" said Ch. 59-309. Upon the applicant's compliance with the requirements of said §4 of Ch. 59-309, and the payment of the required license fee, and upon the comptroller's determination of the applicant's proper qualifications, the license is issued to expire on the last day of August following. These licenses must be prominently displayed by both brokers and solicitors. Mortgage brokers are required to post bond in the amount of \$5,000.

Mortgage broker's and solicitor's licenses, issued under said Ch. 59-309 are subject to suspension or revocation for cause by the state comptroller as commissioner. Section 8 of the act fixes and regulates the compensation to be charged by mortgage brokers for their services. The fees imposed on mortgage brokers and solicitors by subsection (e) of said Chapter 59-309, appear to be regulatory fees and not license taxes; they are to be used in administering said Ch. 59-309 and do not provide revenue for the general operation of the state or any county. Only those "laws and parts of laws in conflict" with said Ch. 59-309 are repealed by §13 thereof.

Under §205.58, F. S., "every person engaged in the business of trading, bartering, buying, lending or selling intangible personal property, whether as owner, agent, broker, or otherwise, shall pay a license tax of twenty-five dollars for each place of business. . . ." These license taxes are payable into the state treasury to the credit of the state general fund, and to the county commissioners as a



part of their general tax fund, as in said Ch. 205, F. S., is provided. Taxes under Ch. 205, F. S., are for revenue purposes and fees paid under Ch. 59-309 are for regulatory and not revenue purposes.

The mortgage solicitor appears to be in the employment of the mortgage broker who is responsible for his actions (subsection (c), §4, Ch. 59-309); the license issued to the solicitor must remain in the office of the broker, and in possession of the broker, who, upon the termination of the relation of broker and solicitor must return it to the commissioner for cancellation (subsections (i) and (j) of §4). Only the broker, and not the solicitor, is required to give bond. (subsection (1) of said §4). The solicitor, therefore, is an employee of the broker and not an independent operator or businessman. He is a member of the personnel of the broker. He is not within the purview of §205.58, F. S. There is no indication in Ch. 59-309, or otherwise, that a mortgage solicitor thereunder may be classified as a person engaged in a profession within the purview of §205.52, F. S.; neither §205.52 nor §205.58 seem to require a separate license of a mortgage solicitor.

The above question is, therefore, answered in the negative.

060-8—January 12, 1960

#### TAXATION

#### STATE OCCUPATIONAL LICENSE TAXES — PRODUCTION CREDIT ASSOCIATIONS ORGANIZED UNDER FEDERAL LAW — §205.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are production credit associations, organized under federal statutes and laws, subject to Florida occupational license taxes imposed by Ch. 205, F. S.?**

This question specifically involves the Monticello production credit association; however, we are not specifically informed whether or not the U. S. or some agency thereof owns stock in said production credit association. Production credit associations are organized and exist under and pursuant to §§1131 et seq., title 12, of the U. S. Code. Such associations were held in *Southwest Washington production credit association v. Fender*, 21 Wash. 2d 349, 150 P. 2d 983, to be agencies of the U. S. Under §1138(b), title 12, U. S. code, production credit associations are authorized to act "as fiscal agents of the United States Government."

Under §1138(c), title 12, U. S. code, production credit associations are deemed instrumentalities of the U. S. and their notes, debentures, bonds and other obligations exempt both as to principal and interest from all taxation, with certain exceptions therein mentioned not here material, imposed by the U. S. or any state, likewise their franchises, capital, reserves, surplus and other funds are exempt from federal and state taxation. However, "any real property and any tangible personal property of such banks or associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." The exemption in said §1138(c) "shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired." The exemptions contained in said §1138(c) seem to apply to the property and property rights of the production credit association and make

no mention of occupational licenses and license taxes.

"As a general rule a state may not impose a license or privilege tax on the activities of the federal government or on the business of any of its agencies or instrumentalities except where the United States has consented to such tax" (53 C. J. S., 469, 470, §6). This rule "in various instances has been held to prevent the imposition of a state license, privilege, occupation, sales, use, or other excise tax on a national bank, a federal land bank, an army post exchange," as well as other federal agencies (53 C. J. S. 557, §29), and in *Southwest Washington Production Credit Ass'n v. Fender*, 21 Wash. 2d 349, 150 P. 2d 983, the rule was extended to production credit associations in that state. Production credit associations under the federal statutes were held not subject to occupational license and similar taxes in Mississippi (March 5, 1959, attorney for state tax commission), Kentucky (May 28, 1955, attorney for department of revenue), Georgia (Jan. 31, 1955, attorney general), North Carolina (Dec. 9, 1948, attorney general) and South Carolina (Nov. 25, 1947, assistant attorney general).

Under §205.01, F. S., "no person shall engage in or manage any *business, profession or occupation*, for which an occupational license tax is required" unless such license tax be paid and a license obtained. The term "business" as used in said section of the statutes was discussed by the court in *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, and held to mean a "business in the trade or commercial sense, one carried on with a view to profit and livelihood." See also our opinion of Oct. 7, 1959 (059-204). Production credit associations do not appear to be designed as general business corporations, but as agencies of the U. S. under the welfare or other provision of the federal constitution. They are one of the federal agencies designed to aid and assist farmers and similar persons. This casts doubt upon the application of Ch. 205, F. S., to production credit associations without regard to the federal laws applicable to the subject. Such associations are not engaged in, nor do they manage, a "business, profession or occupation" within the purview of said §205.01, F. S., at least, so long as the U. S. holds stock therein. Even after such stock has been retired the association does not cease to be a federal instrumentality and agency. Such associations, in the absence of federal statutes authorizing such taxation, may not be taxed, inasmuch as they are federal agencies. This poses the question as to the existence of federal authority to tax such associations.

A reading of §1138 (c), title 12, of the U. S. code, leaves the impression that only taxes against real and personal property and the franchises, capital, reserves, surplus and other funds and their income are embraced. No mention is made of licenses and license taxes. License taxes are not property taxes but are taxes imposed for the privilege of engaging in a business or profession (*St. Petersburg v. Florida Coastal Theaters, Fla.*, 43 So. 2d 525). In this connection see also *Hartford Production Credit Ass'n v. Clark*, 118 Conn. 341, 172 Atl. 266; *Federal Land Bank v. Bismark Lumber Co.*, 314 U. S. 95, 62 S. Ct. 1, 86 L. ed. 65; *Leggett v. Federal Land Bank*, 204 N. C. 151, 167 S. E. 557; *Fletcher's Encyclopedia of Law on Corporations*, Permanent Ed., Vol. 17, p. 21, §8291. Even upon the retirement of the stock in production credit associations held by the U. S., such agencies continue to be federal agencies.

Finding no federal statute permitting the operation of oc-

cupational licenses and license taxes on federal production credit associations, and feeling that §1138 (c), title 12, of the U. S. code, does not extend to occupational license taxes, the above question is answered in the negative.

060-9—January 12, 1960

**CITIES AND TOWNS**  
**MUNICIPAL POLICE OFFICER — POWERS OF ARREST—**  
 §§901.22 AND 901.18, F. S.

*To: L. F. Harrison, Chief of Police, Avon Park*

**QUESTION:**

May a municipal police officer arrest a person beyond the corporate limits of a municipality for violating a state law or municipal ordinance where such violation occurred within the limits of the municipality and the violator is immediately pursued to a point outside of said municipality?

This office has previously held that a municipal police officer may arrest for violation of either a state statute or a municipal ordinance when the violation occurs within the municipal boundaries but that such power does not operate to extend his territorial limits of duty beyond the municipal boundaries. (See A.G.O. 055-24, Feb. 9, 1955.) I believe this is to be a correct statement of the law.

The general law on this question is stated in 6 C.J.S., Arrest, §12(2), as follows:

. . . Ordinarily, in the absence of a statute providing otherwise, a peace officer, when acting without a warrant, or when acting under a warrant directed to him by description of his office, or directed generally to the class of officers to which he belongs, may arrest in his official capacity only within the limits of the geographical or political subdivision of the state of which he is an officer.

Of course, should an arrest be made within the municipality for violation of a state law (where no municipal ordinance exists making the same acts a violation), the violator would have to be turned over to county or state authorities for prosecution.

Accordingly, unless the authority to make such arrests has been specifically granted either by the municipal charter or an applicable special act, your question is answered in the negative.

There is, however, an exception to the opinion stated above when a person who has been lawfully arrested by a municipal peace officer within the limits of the municipality escapes or is rescued from the custody of the arresting officer. Under such circumstances the escapee may be pursued and retaken without warrant at any time or place within the state (§901.22, F. S.).

While not a common occurrence, there are times when a violator is stopped and placed under arrest and then decides to flee in order to avoid the arrest. Under such circumstances, and in view of the above, such a violator could be pursued and retaken at any point in the state.

Another exception to this opinion could arise under §901.18, F. S., which provides that any officer making a lawful arrest may summon persons to aid him in making the arrest. Should an officer (for example, a member of the county patrol of your county) acting within the territorial limits of his authority, but outside

yours, call upon you for assistance, then such assistance could be provided under authority of §901.18.

060-10—January 12, 1960

# COURTS

## SALARY OF CLERK OF CIRCUIT COURT, PINELLAS COUNTY UNDER CH. 59-632—CHS. 28777, 1953; 30475, 1955; 57-987

To: Ray E. Green, State Comptroller, Tallahassee

### QUESTIONS:

1. What is the annual salary of the clerk of the circuit court in and for Pinellas county, and from what funds is it payable?

2. Are fees and commissions received by the said clerk, as agent of the trustees of the internal improvement fund and from the sale of documentary stamp taxes income of the clerk or the clerk's office?

The latest legislation upon the question of the salary or compensation of the clerk of the circuit court in and for Pinellas county, appears to be chapter 59-632, which fixes the salary of the clerk of the circuit court in counties having a population between 150,000 and 240,000, according to the latest official census, at \$13,000 per annum, payable monthly. Pinellas county, with a population of 159,249, was the only county under the latest official census within the above population bracket. This same act provides that the salary of the clerk of the circuit court thereunder shall be paid "in equal monthly installments from the same funds as the clerk of the circuit court is now being paid," (emphasis supplied) that is, on June 25, 1959. In construing a statute it is proper to consider laws passed at prior sessions of the legislature, including those repealed or amended, as well as those passed at the same session (*Amos v. Conklin*, 99 Fla. 206, 126 So. 283; *Marvin v. Housing Authority of Jacksonville*, 133 Fla. 590, 183 So. 145; *Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388).

When we examine the history of this law we find that Ch. 28777, 1953, fixed the salaries of clerk of the circuit court, tax assessors, sheriffs, and others, in counties having populations between 120,000 and 300,000, those in counties with populations between 120,000 and 150,000, being fixed by \$1 thereof, and those with populations between 150,000 and 300,000 by \$2 thereof. The salaries fixed by these two sections were payable from the fees and commissions collected by the respective officers. Section 1 of said Ch. 28777 was amended by Ch. 30475, 1955, which raised the salary of the clerk of the circuit court from \$9,000 to \$10,000, which act was further amended by Ch. 57-987, which, although it did not raise the clerk's salary did raise that of the county judge. Section 1 of said Ch. 59-632, was in effect an implied amendment of said Chs. 28777, 30475 and 57-987. Under these chapters the salaries fixed by them were payable "from the whole or part of the fees and commissions so collected and earned," that is, from the net income of the office. Therefore, under §2, Ch. 59-632, the clerk of the circuit court in and for Pinellas county is to receive \$13,000 per annum, payable monthly, from the net income of his office received from fees and commissions.



Section 3, Ch. 28777, 1953, which was not repealed or otherwise affected by Chs. 30475, 57-987 or 59-632, provides that the fees and commissions of the clerk's office "include all fees and commissions paid into such office or to such officer by virtue of his holding such office, *including* all fees received by the clerk of the circuit court as agent of the Trustees of the Internal Improvement Fund and in the sale of documentary stamps." The references made in the "Clerk's Manual" on pp. 69, 335 and 363, to fees received from the trustees as their agent (sale of Murphy act lands) and in connection with the sale of documentary stamp taxes applies in those cases where not governed by local, special or population laws. Here a different rule is declared by §3, Ch. 28777, 1953, which has not been amended or repealed and remains in full force and effect in Pinellas county, notwithstanding Ch. 59-632. The fees and commissions mentioned in question 2 are income of the office and not the clerk individually.

060-12—January 15, 1960

#### TAXATION

##### DEFINITION OF WORD "TAXPAYER" AS USED IN §167.61, F. S.

To: *LeRoy Collins, Governor, Tallahassee*

##### QUESTION:

Does the word "taxpayer" as used in §167.61, F. S., contemplate any taxpayers other than ad valorem taxpayers?

Legislative intent is the pole star by which the courts must be guarded in construing the acts of the legislature (*Fla. State Racing Comm. v. McLaughlin, Fla., 102 So. 2d 574; Ervin v. Peninsular Tel. Co., Fla., 53 So. 2d 647; Smith v. Ryan, Fla., 39 So. 2d 281*).

In this instance all surrounding facts and circumstances point to the conclusion that the word "taxpayer" as used in §167.61 F. S., means a freeholder.

Your question as presented above is therefore answered in the negative.

060-13—January 18, 1960

#### TAXATION

##### TAX SALE CERTIFICATES—LIMITATIONS, SUBSEQUENT AND OMITTED TAXES—§§95.021, 192.04, 192.21, 193.16, 193.49, 193.63, 193.71 AND 196.12, F. S., CH. 4322, 1895.

To: *Ray E. Green, State Comptroller, Tallahassee*

##### QUESTION:

Where a tax sale certificate is barred by the limitations of §196.12, F. S., or by said section as implemented by §95.021, F. S., are the subsequent and omitted taxes encumbering the same land also barred by the said limitations?

Tax sale certificates more than 20 years old were considered in our opinion 058-348, of Dec. 31, 1958 (1957-8 A.G.O. 938); however, the effect of the limitations upon the subsequent and omitted taxes encumbering the same land was not also considered

in and by said opinion. Prior to the adoption of Ch. 4322, 1895 (now appearing, as amended, as §193.16, F. S.) land against which there existed a state owned tax sale certificate was assessed for successive years and additional tax sale certificates issued if such taxes were not paid. In many instances this gave rise to successive tax sale certificates encumbering the same tract of land for each year assessed. Doubtless the 1895 act was designed to reduce the number of outstanding state held tax sale certificates encumbering the same parcel of land. (See also §§193.63 and 193.71, F. S.)

When such state or county held tax sale certificates are or were redeemed the clerk of the circuit court is and was required to collect the subsequent and omitted taxes (§193.71, F. S.). Where there is a state or county outstanding tax sale certificate encumbering a parcel of land, although the lands are described on the tax roll and their valuation entered thereon the taxes are not extended on the roll (§193.71, F. S.). When application is made to a clerk of the circuit court for the redemption of a state or county tax sale certificate such clerk is required to also collect all subsequent and omitted taxes, based upon the valuations so fixed by the tax assessor. This seems to pose the question of whether such subsequent and omitted taxes, without regard to the previous tax sale certificate, constitute tax liens, in addition to the lien of the said certificate, under §192.21, F. S.

Said §192.21, F. S., provides that "all taxes imposed pursuant to the constitution and laws of this state shall be a first lien, superior to all other liens on any property against which such taxes have been assessed . . ." (emphasis supplied) which lien attaches, under §§192.04 and 193.49, F. S., "from the first day of January for which year the property is liable to assessment." (Emphasis supplied.) This brings us to the question of whether or not the entry of the description of real property, its valuation, and maybe the name of its owner, on a tax roll, without extending the amount of the taxes thereon, as is provided in and by §193.63, F. S., constitutes the imposition and assessment of taxes against the lands so described on the tax roll, but against which no taxes are extended. Tax liens in this state are creatures of statute and have no constitutional recognition (*State v. Culbreath*, 140 Fla. 634, 192 So. 814, text 818; *Prince Hall Masonic Bldg. Ass'n v. Jacksonville*, 149 Fla. 109, 6 So. 2d 250, text 253). Taxes upon real property are, under §§192.04, 192.21 and 193.49, F. S., secured by first liens upon the property taxed from the time such taxes are imposed or assessed. In *City of Miami v. Miami Realty Loan and Guaranty Co.*, 57 Fla. 366, 49 So. 55, text 56, a complaint for the foreclosure of taxes and tax liens was held "defective in failing to allege when the taxes were assessed and the levy made." District Judge Shepard, in *Jackson Lumber Co. v. McCrimmon*, Fla., 164 Fed. 759, text 763, construed the term "assessment" as used in the Florida taxing statutes as not meaning merely the valuation of the taxable property but as including "the whole statutory mode of imposing the tax."

It is stated in 5 C. J. 816, that the term "assessment," when used in connection with taxation, "consists of the two processes of listing the persons, property, etc., to be taxed, and the estimating of the sums which are to be the guide in the apportionment of the tax . . ." It is not "merely the valuation of the property for taxation, but the whole statutory mode of imposing the tax . . ." (5 C. J. 817). "Assessment is one of the three parts of the process of

raising revenue by tax on property, the other two being the levy . . . and the collection . . ." (84 C. J. S. 746, §391). "The listing of property, while a step in the proceeding for assessment, is not in itself an assessment" (84 C. J. S. 749, §391). It is, therefore, evident that no taxes have been imposed on real property, within the purview of §192.21, F. S., by the listing of the lands and fixing their value; there is no imposition within said section until the taxes have been extended. Doubtless it was the intention of the legislature that, under the proceedings provided in §§193.16 and 193.63, F. S., under which only the description and valuation of lands encumbered by a state or county owned tax sale certificate are entered on the tax roll, but no taxes are extended thereon, to make the subsequent omitted taxes part and parcel of the existing tax sale certificate, by appending to the said tax sale certificate the taxes that would otherwise have been assessed except for the outstanding certificate. The lien of the tax sale certificate extends to these taxes and attaches them to the lien of the certificate. Subsequent omitted taxes, so attached to the tax sale certificate, are barred when the certificate itself is barred.

The above stated question is, therefore, answered in the affirmative.

060-15—January 21, 1960

#### BANKS AND BANKING

ISSUANCE AND SALE OF TRAVELLERS CHECKS AND MONEY ORDERS BY FOREIGN BANKS—§§658.02, 659.52, 660.10 AND FORMER §§652.25 AND 613.07, F. S.; CH. 59-129

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**May a foreign banking institution, either directly or through an agent, issue or sell travellers checks or money orders, or either, in this state?**

Although there is no definition in the Florida Statutes as to what constitutes and what does not constitute a banking business, §659.52, F. S., provides that "*no person, other than a bank, shall:* (a) Solicit or receive deposits, issue certificates of deposit, with or without provision for interest, make payments on checks, *issue or sell travellers checks*, or money orders or transact business in the way or manner of a commercial bank or trust company," (emphasis supplied) excepting, however, any person who, for not less than five years prior to May 25, 1959, had been engaged in the sale of travellers checks and money orders, and who has a net worth of \$1,000,000 or more. The American Express company, and possibly three or four foreign banking institutions, appear to have been selling travellers checks or money orders in this state for more than five years and have a net worth of \$1,000,000 or more. There has now arisen the question of the authority of foreign banking institutions, without regard to the five year and million dollar requirement, just mentioned, to issue and sell travellers checks and money orders in this state. This question arises by reason of the definition of a "bank" as used in Chs. 658-661, F. S.

Section 658.02(1), defines the term "bank" as used in Chs. 658-661, F. S., to mean "any person doing a banking business whether subject to the laws of this or *any other jurisdiction*," with two exceptions not here material. (Emphasis supplied.) This

definition of a "bank," as used in Chs. 658-661, F. S. (the Florida banking code), seems broad enough to include foreign banking institutions. If the above mentioned §659.52, F. S., is to be read in the light of this definition, then any person "doing a banking business whether subject to the laws of this or any other jurisdiction" may "issue or sell travellers checks or money orders . . . or transact business in the way or manner of a commercial bank or trust company." This conclusion would seem to result when §659.52, F. S., is read in connection with the definitions set out in §658.02, as used in Chs. 658-661, F. S.; however, "since the intention of the Legislature embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall . . . ascertain and give effect . . . to the intention or purpose of the Legislature as expressed in the statute." (82 C. J. S. 560 and 561, §321). "There is no invariable rule for the discovery of the intention of the legislative body, but the question of legislative intent must be decided from the peculiar facts and circumstances of each enactment." (82 C. J. S. 571, Section 322). "In construing a statute to give effect to the intent or purpose of the legislature, the court must look to the object to be accomplished and the evils or mischief sought to be remedied. In ascertaining the intent and purpose, the court must also look to the purpose to be subserved by the statute, and should place such construction on it as will, if possible, effect the purpose of the statute . . ." (82 C. J. S. 593-601, §323).

All statutes should be construed "in connection with and in harmony with existing law, and as a part of a general and uniform system of jurisprudence, that is, they are to be construed with reference to the whole system of law of which they form a part." (82 C. J. S. 794, §362). The court may look to prior and contemporaneous statutes to determine the meaning of a statute, especially statutes which relate to the same subject matter and which may be said to be in *pari materia*. (82 C. J. S. 801, et seq., §366). We, therefore, refer to statutes and laws which, prior to the adoption of Chs. 658-661, F. S., regulated banks and banking in this state, with special reference to former §652.25, F. S., which was repealed by §5, Ch. 28016, 1953, which act adopted present Chs. 658-661, F. S., which §652.25 provided that "no person, firm or company shall be allowed to conduct a banking business in this state *without first being incorporated under the banking laws of this state or being authorized to do business under the national banking laws.*" (Emphasis supplied.) This section expressly prohibited a foreign bank doing a banking business in this state. The repeal of this section would seem to provide a different rule in this state unless it may be said that Chs. 658-661, F. S., or some other Florida state or law continues the said prohibition. The said prohibition in former §652.25 was derived from §1 of Ch. 6812, 1915; subsequent provisions of said Ch. 6812 were rendered obsolete by subsequent legislation and were omitted from the Florida Statutes, 1941, however, said §652.25 remained in force until the adoption of Ch. 28016, 1953. We note that under Ch. 5717, 1907, requiring the qualification of foreign corporations in this state prior to transacting business in this state, included all foreign business corporations, not excluding foreign banking institutions. However, said Ch. 5717, 1907, was amended by Ch. 6876, 1915, so as to exclude banking corporations therefrom. This may seem to indicate an



intention on the part of the legislature to no longer require qualification of foreign banks before transacting business in this state; however, said §652.25 was derived from §1 of Ch. 6812, 1915, and doubtless was the reason for the amendment of said Ch. 5717 by Ch. 6876. As foreign banking institutions were prohibited by Ch. 6812 from transacting business in this state there was no longer any reason for their qualification for the transaction of business in this state. If the 1953 legislature by its repeal of §652.25 intended to reverse the rule therein provided and permit foreign banking institutions to transact business in this state, then why did they not amend or repeal §613.07, F. S., excluding banking institutions from Ch. 613, F. S., and require their qualification under Ch. 613 prior to doing business in this state? This seems to indicate absence of any legislative intent to authorize a general banking business in this state by foreign banking institutions.

When the history of banking statutes and regulations in this state, especially §652.25, former Florida Statutes, now repealed, is considered when construing Chs. 658-661, F. S., which apply tight regulations upon domestic banking institutions, although they do not purport to regulate foreign banking institutions desiring to transact a banking business in this state, we arrive at the conclusion that they may not transact a banking business in this state under their charters obtained elsewhere. It may be noted that under the provisions of §660.10, F. S., only bank and trust companies incorporated under the laws of this state may transact a trust business in this state. Under this statutory provision a foreign banking institution, even if permitted to transact a banking business in this state, could not transact a trust business. We find nothing in Chs. 658-661, F. S., clearly indicating any intention on the part of the Florida legislature to permit foreign banking institutions to transact a banking business in this state; although there is no clearly expressed prohibition against such business. If the legislature had, by its repeal of former §652.25, F. S., intended to permit foreign banking institutions to transact a banking business in this state it would have been logical for them to have required that they at least qualify under Ch. 613, F. S., but this was not done. There is no evidence of an intention on the part of the legislature to return to the rule in effect prior to the adoption of Ch. 6812, 1915 (§652.25, former Florida Statutes).

We, therefore, come to the conclusion that it was not the intention of the Florida legislature by its repeal of §652.25, F. S., and the adoption of Chs. 658-661, F. S. (Ch. 28016, 1953), to permit a foreign banking institution to transact a general banking business in this state. The legislature did not, by its definition of "a bank" in §658.02(1), F. S., intend to authorize a foreign bank to transact a general banking business in this state. The legislative intent, when it enacted said Ch. 28016, 1953, is the polar star for courts in construing legislation (*Ervin v. Peninsular Telephone Co.*, Fla., 53 So. 2d 647).

The cashing of checks, issuance and sale of travellers checks and money orders, and other services concerning money, appears to be a proper subject of police regulation for the protection of the general public (*McDoughall v. Lueder*, 389 Ill. 141, 58 N. E. 2d 899, 156 A.L.R. 1059; *People v. Thillens*, 400 Ill. 224, 79 N. E. 2d 609; *Willis v. Fidelity & Deposit Co.*, 345 Ill. App., 373, 101 N. E. 2d 513; *Godlin v. Auditor of Public Accounts*, 414 Ill. 89, 110 N. E.

2d 234; Thillens, Inc. v. Morey, Auditor of Public Accounts, 11 Ill. 2d 579, 144 N. E. 2d 735; Durchlag v. Smith, Auditor of Public Accounts, 14 Ill. 2d 549, 152 N. E. 2d 828; Cohn v. Smith, Auditor of Public Accounts, 14 Ill. 388, 153 N. E. 2d 83; State v. Currency Exchange, Mo., 218 S. W. 2d 600; Currency Services v. Matthews, DC Wis., 90 Fed. Supp. 40; Morey, Public Auditor v. Doud, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 1485). In effect Florida has assumed regulation over travellers checks and money orders, and their issuance and sale in Florida, by declaring them to constitute elements of banking business within the state.

We, therefore, hold that the issuance and sale of travellers checks and money orders in this state is confined to banks organized and existing under the laws of Florida, except as to those persons who were and had been engaged in the issuance and sale of such instruments for five or more years on May 25, 1959 (the effective date of Ch. 59-129), and have a net worth of one million dollars or more. Foreign banking institutions are without authority to issue and sell travellers checks and money orders in this state, unless they be within the above mentioned exception, except by and through a Florida banking institution or a national bank having its principal place of business in Florida.

060-16—January 22, 1960

#### TAXATION

COMMISSIONS OF TAX COLLECTOR AND ASSESSOR OF  
PALM BEACH COUNTY—SERVICES PERFORMED IN  
CONNECTION WITH COUNTY WATER CONTROL  
DISTRICT—CH. 59-994—§§298.401 AND 193.65, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. Is the rate of compensation of the tax collector and tax assessor of Palm Beach county for services performed in connection with the northern Palm Beach county water control district taxes determined under the provisions of §298.401, F. S., or under those of §193.65, F. S.?

2. Are the payments received by the tax collectors and tax assessors in connection with said district taxes a part of the income of the offices of tax assessor and tax collector of Palm Beach county?

#### AS TO QUESTION 1:

Chapter 59-994 established the northern Palm Beach county water control district. Section 12 of said chapter provides:

... The Tax Assessor, Tax Collector and Clerk of the Circuit Court of Palm Beach County shall be entitled to compensation for services performed in connection with taxes of said District at the same rates as apply to County taxes. (Emphasis supplied.)

Language similar to that contained in §12, supra, has been construed to mean that the fees and commissions contemplated by such language are the fees fixed in §193.65(1), F. S., for the collection of the county general taxes, (A. G. O. 059-237, Nov. 25, 1959).

Since §12, supra, provides that the rate of compensation for tax assessors and collectors shall be based upon the same rates as

apply to county taxes (which rates are contained in §193.65 (1), supra), said §12 is determinative of the rate of compensation payable to such officers; and §193.65 (1), supra, will govern the rate of compensation.

In light of the above statements, I am of the opinion that the rate of compensation of the tax collector and the tax assessor of Palm Beach county for services performed in connection with the northern Palm Beach county water control district is determined in accordance with the provisions of §193.65 (1), supra.

#### AS TO QUESTION 2:

Section 2 of Ch. 59-994, supra, provides in part:

... The provisions of the General Drainage Laws of Florida applicable to drainage districts or sub-drainage districts which are embodied in *Chapter 298*, Florida Statutes, and all of the laws amendatory thereof, now existing or hereafter enacted, so far as not inconsistent with this Act, are hereby declared to be applicable to said Northern Palm Beach County Water Control District . . . (Emphasis supplied.)

Section 298.401(2), F. S., relating to the characterization of services of tax collectors and assessors, provides as follows:

(2) The services of the tax assessors and tax collectors in assessing and collecting such drainage district taxes are hereby declared to be *special services* performed directly for these districts and *any payment therefor shall not be considered a part of the general income of the official's office, nor come under the provisions of §§116.03 and 145.03*. The personnel required to do said special work shall be paid for such special services from the receipts provided in subsection (1) above. (Emphasis supplied.)

The above-quoted provisions clearly provide that the payments received by the said officers are *not* to be considered as part of the general income of such office. By virtue of the provisions of §2 of Ch. 59-994, supra, relating to the adoption of Ch. 298, supra, §298.401(2), supra, is applicable to the tax assessor and the tax collector as such provisions *do not* relate to the rate of compensation to be received by such officers. It should also be noted that under subsection (2), supra, any personnel required to do the special work referred to in said subsection shall be paid for such special services from the receipts provided in §193.65, supra.

In light of the above statements, it is my opinion that payments received by the tax collectors and the tax assessors of Palm Beach county in connection with said water control district's taxes are not part of the income of such officers' offices. Your question is therefore answered in the negative.

060-17—January 22, 1960

#### EXECUTIVE COMMITTEES, POLITICAL PARTIES APPOINTMENT OF ADDITIONAL PRECINCT COMMITTEE MEN AND WOMEN—§103.111(2), F. S.

To: Mabel Payne Johnson, Acting Chairman, Hillsborough  
County Democratic Executive Committee, Tampa

#### QUESTION:

Is each county political party executive committee  
in a precinct having in excess of 1,000 registered electors

entitled to an additional precinct committee man and committee woman under the provisions of §103.111(2), F. S., or must there be in excess of 1,000 registered electors of the party within the precinct before an additional committee man and committee woman can be elected or appointed for that precinct?

This appears to be a question of first impression which has not previously been considered by this office.

The cardinal rule of statutory construction is to ascertain the legislative intent (Florida State Racing Commission v. McLaughlin, Fla. 102 So. 2d 574, Ervin v. Peninsular Tel. Co., Fla. 53 So. 2d 647). While §103.111(2), F. S., speaks only of registered electors within the precinct making no reference to political parties, the section under consideration must be considered in the light of surrounding legislation and it must be construed so as to blend harmoniously with the statute as a whole (Chiapetta v. Jordan, 153 Fla. 788, 16 So. 2d 641, A. G. O. 057-269, 1957-58 biennial report p. 324).

All of Ch. 103, F. S., relates to political parties, providing for the establishment and organization of political party committees. This being the case, it would appear that §103.111(2), F. S., should be construed as applicable to individual political parties. To rule otherwise could result in absurdities, and a construction which leads to absurd conclusions is frowned upon (Johnson v. State, Fla. 91 So. 2d 185, State Dept. of Public Welfare v. Bland, Fla. 66 So. 2d 59). For instance, if there were 1,001 registered electors in precinct "A" and of that group 850 registered electors belonged to X party and 150 belonged to Z party it would seem foolish for Z party to have two precinct committee men and committee women representing that precinct on the county committee. Taking such a conclusion one step further the hypothetical precinct A just referred to could possibly out-represent another precinct having 999 registered electors, even if all 999 were members of the same party.

In passing, it might be pointed out that it is not mandatory that additional precinct committee men and committee women be appointed under the provisions of §103.111 (2), F. S., even if there is a precinct registration in excess of 1,000 and therefore a county committee should be guided by its needs in determining whether or not additional precinct committee men and women should be elected or appointed.

Based on the authority and argument set out herein it is the conclusion of this office that a political party must have in excess of 1,000 registered electors of its party within a given precinct before being entitled to an additional precinct committee man and committee woman for any given precinct.

060-18—January 25, 1960

**COUNTY-OWNED TANGIBLE PERSONAL PROPERTY  
SUPERVISION AND MANAGEMENT—RESPONSIBILITY OF  
BOARD OF COUNTY COMMISSIONERS—CH. 274(59-163),  
§§274.01, 274.03, 125.01, F. S.**

To: *Bryan Willis, State Auditor, Tallahassee*

**QUESTIONS:**

1. Is the board of county commissioners of a county the "governmental unit" which is responsible for carry-



ing out the provisions of Ch. 274, F. S., with respect to the care of tangible personal property in the offices of the clerks of the courts, tax collectors, tax assessors, various judges and justices of the peace, and sheriffs and constables—whether such property was acquired with either the funds of said board or those of the enumerated offices?

2. If the answer to question 1 is in the affirmative, is it the duty of the various county officers enumerated above to comply with the instructions of the board of county commissioners in carrying out the provisions of Ch. 274, *supra*?

AS TO QUESTION 1:

Chapter 274, F. S. (Ch. 59-163), relating to tangible personal property owned by counties, provides a comprehensive method for the supervision, control, and management of such county property.

The primary responsibility for the supervision and control of such county property rests upon the "governmental unit" of the county (§274.03, *supra*). The "governmental unit" as defined in §274.01, F. S., is the "governing board, commission or authority of a county," in this case, the board of county commissioners.

Chapter 274, *supra*, is by no means the first indication that the responsibility of county property is vested in the board of county commissioners. Prior to the passage of said chapter, the responsibility for care and improvement of county property rested in the board of county commissioners under §125.01, F. S. (See A. G. O. 056-187, p. 705 of the 1955-1956 biennial report of the attorney general.) However, Ch. 274, *supra*, appears to be the first legislative act providing a complete, orderly, and practicable procedure for the supervision and control of county personal property.

Chapter 274, *supra*, makes no distinction between property purchased with the funds of the board of county commissioners and property purchased with the funds of the various county offices. Property acquired through either of the foregoing methods becomes *county property* immediately upon the purchase thereof although the use and control of such property may be delegated to a particular county office (§274.03, *supra*).

In A. G. O. 056-187, *supra*, I pointed out that:

Where substantial items of equipment are purchased from the excess fee fund or from county general funds, and we include in this list substantial items of equipment purchased by the officer from the income of his office as an office expense (such purchases should be made by the officer only after having obtained the consent of the board of county commissioners), *such items became county property*, under the supervision and control of the incumbent of the office for which purchased, and *not property of the office or its incumbent for which purchased*. (Emphasis supplied.)

In light of the above statements, I am of the opinion that the duty and responsibility for carrying out the provisions of Ch. 274, *supra*, rest upon the board of county commissioners and relate to property acquired with either the funds of said board or those of the various county offices.

Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

The control and supervision of county property is vested in the

board of county commissioners. Such board is authorized to make appropriate orders concerning the care of such property (§§274.03 and 125.01, F. S.; 1933 A. G. O. 491).

Section 274.03, F. S., provides for the delegation of custody of county property and that the person to whom the custody of county property has been delegated by the "governmental unit" shall be responsible to such "unit" for the safekeeping and proper use of such property under his care. In order to carry out the purposes for which Ch. 274, supra, was enacted; namely, the care and control of county property, it would seem to be the duty of the various county officers to whom such property has been intrusted to comply with the instructions of the board of county commissioners. Any other conclusion would leave the provisions of Ch. 274, supra, meaningless.

In view of the above statements, I am of the opinion that the various county officers (as enumerated in question 1) to whom county property has been intrusted—whether such county property has been purchased by funds of the board of county commissioners or by the funds of the various county offices—should comply with the instructions of the board of county commissioners and exercise the fullest cooperation with such board in carrying out the purposes for which Ch. 274, supra, was enacted.

I must point out, however, that while the authority of the board of county commissioners under Ch. 274, supra, relates to the supervision, control, protection, inventory, maintenance, etc., of county property, such authority *does not* extend to the point of hampering other county officers in the efficient discharge of their official duties. Therefore, the supervisory authority of the board of county commissioners must be exercised in a manner so as to permit other county officers to discharge their constitutional statutory powers and duties; and any exercise of such authority which would arbitrarily curtail the powers and duties of the county officials would not only be unwarranted but would constitute unreasonable interference which would be restrained by the courts.

Question 2 is therefore answered in the affirmative.

060-19—January 25, 1960

#### LEGISLATION

EFFECTIVE DATES OF CHS. 59-575, 59-697 AND 59-700—§§18 AND 28, ART. III, STATE CONST.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTION:

**On what dates did the salaries provided by Chs. 59-575, 59-697, and 59-700 become effective?**

The acts referred to in this inquiry contain an immediate effective date clause, to-wit:

This act shall take effect immediately upon becoming a law.

The purpose of this clause is to avoid the operation of §18, Art. III, State Const., which provides:

No law shall take effect until sixty days from the final adjournment of the Legislature at which it may have been enacted, unless otherwise provided in such law.

Therefore, in order to effectively answer your inquiry, it will be necessary to ascertain the date when Chs. 59-575, 59-697, and

59-700, supra, became laws. Section 28, Art. III, State Const. (as amended in 1954), provides the procedure by which a bill passed by legislature shall become a law:

*Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor; if he approves it he shall sign it, but if not he shall return it with his objections to the House in which it originated, which House shall cause such objections to be entered upon its Journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote of members present, which vote shall be entered on the Journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor, (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty days after the adjournment, shall file such bill with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law. . . . (Emphasis supplied.)*

Careful reading of the above-quoted constitutional provision indicates that there are three ways by which a bill may become a law: passage by the legislature and signing by the governor; passage by the legislature and disapproval by the governor and passage over the veto in the manner prescribed; passage by the legislature and failure of the governor to return it with his objections within the specified time. Any attempt by the governor to exercise his power of approval or veto of a bill in a manner other than that authorized is generally regarded as ineffectual and void (50 Am. Jur., Statutes, §104, p. 107).

Examination of the senate journal and the files of the secretary of state indicates that Ch. 59-575, supra, was passed by the senate on June 4, 1959, and filed in the secretary of state's office on June 19, 1959; Chs. 59-697, supra, and 59-700, supra, were passed by the senate on June 3, 1959, and filed in the secretary of state's office on June 17, 1959. All three acts became laws without the governor's approval, thereby indicating that the governor failed to return said bills with his objections within the time specified under §28, Art. III, supra.

As is evidenced by the dates of the bills' passage, the legislature, by its final adjournment on June 5, 1959, prevented the governor from exercising his objections within the five-day constitutional period; and as a result thereof, the governor had 20 days after such adjournment in which to file his objections. Even though the governor did not have any objections to the passage of said bills, the fact that he transmitted the three bills to the secretary of state within that 20-day period did not constitute an *approval* within the constitutional provision since an approval contemplates a *signing*. In other words, the governor may have had no objections to the bills; however, they did not become laws unless he either approved by signature or did not raise any objections within the 20-day period.

The governor cannot, in absence of constitutional authority,

waive this 20-day period unless he *signs* a bill or vetoes it within that period. Since the governor did not raise any objections within the 20-day period, nor did he approve by signing, the bills became laws at the end of said period. The original period within which the governor could raise his objections after adjournment as provided by §28, Art. III, was 10 days. This period was extended to 20 days by constitutional amendment in 1954.

An early Florida case, distinguishable factually from the instant situation, contains language therein specifically applicable to a situation where the legislature has adjourned before the governor has had an opportunity to raise objections to a particular bill passed during that session, thereby drawing into operation the time limitation for a governor's action after adjournment as set forth in §28, Art. III, *supra* (Thompson v. State, 56 Fla. 107, 47 So. 816). The concurring opinion in the Thompson case (dissenting in part) stated at p. 818:

... Under the provisions of our constitution, all statutes enacted by our Legislature *become laws* so soon as they are approved by the Governor, or, which is the equivalent of such approval, in the absence of an express veto thereof, *so soon as the time expires that is limited by the Constitution within which the Governor can veto them*, but, unless otherwise specially provided by the Legislature in the law itself as part of it, all such laws lie dormant, and do not become actively effective as laws until the expiration of 60 days from the final adjournment of the session of the Legislature at which they are enacted . . .

\* \* \*

The act was never expressly approved or disapproved by the Governor, but *became a law without his approval at the expiration of the constitutional period allowed for his veto thereof*. (Emphasis supplied.)

The court went on to state, citing from 1 Lewis' Sutherland Statutory Construction, §172:

*When a bill becomes a law by the nonaction of the executive, under constitutional regulations, the nonaction of the executive is a quasi approval, not complete until the lapse of time prescribed for his affirmative action under the given conditions.* (Emphasis supplied.)

In a 1924 case the governor attempted to file his objections to a bill after the 10-day period had elapsed. The court stated:

... and that, the period of time from June 3 to June 14 being more than ten days, the filing of the bill by the Governor, with his objections thereto, in the office of the Secretary of State on June 14, 1921, was after the expiration of this "ten day" period of time and was without effect, *the bill having become a law on the day before such objections were filed* (Croissant v. DeSoto Improvement Company, 88 Fla. 530, 101 So. 37). (Emphasis supplied.)

In several prior opinions dealing with other matters, the provisions of §28, Art. III, *supra*, were applied. In A. G. O. 041-251, pp. 336-7, 1941-1942 biennial report of the attorney general, relating to the law controlling compensation of county superintendents of public instruction, I stated:

Since the Governor *did not approve* Chapter 17863, by operation of the Constitution that Act became a law on



June 14, . . . (Emphasis supplied.)

In the above-stated opinion the 1937 legislature had enacted Ch. 17863 and presented it to the governor on June 2, 1937, subsequently adjourning on June 4.

In opinions 053-168 and 053-216, pp. 227 and 128, respectively, of the 1952-1953 biennial report of the attorney general, I pointed out that the laws involved therein became effective without the governor's signature at the *expiration* of the 10-day period provided by §28, Art. III, *supra*.

The foregoing cases and opinions seem to indicate that the period of time within which the governor may raise his objections to a bill (if adjournment prevents executive action) *must expire* before a bill becomes a law without the governor's approval. Although, coincidentally, bills have been filed in the secretary of state's office at the same time that the specified number of days has expired, it would seem that the fixing of the date when the bill becomes law, without the governor's approval, depends upon the *elapsing of the constitutional period* rather than the *filing* in the secretary of state's office. This conclusion is evidenced by the emphasis placed upon the *expiration* of the stated period by the aforementioned cases and opinions rather than the filing with the secretary of state.

I am not aware of any constitutional or statutory provision, judicial decision, or opinion of this office authorizing a waiver of the 20-day period or permitting a bill to become a law by the mere filing thereof in the secretary of state's office.

It should be noted that in the event that the governor files a bill in the secretary of state's office within this 20-day period without his written approval, it would seem that the governor could recall such bill from the secretary of state and either sign such bill or raise objections thereto if his action *occurs within 20 days* after the adjournment of the legislature. This would appear to be justified in view of the fact that under §28, Art. III, *supra*, an approval of a bill by the governor contemplates that he sign such bill; and in the absence of his signed approval, the governor has a 20-day period after adjournment within which to raise his objections to a bill, which period cannot be waived (unless the bill is signed or vetoed).

In regard to the recalling of bills, it was held that neither the house of representatives nor the senate could, by its *independent resolution*, recall from the hands of the governor any bill which had been duly *passed* and *authenticated* by the legislature once it was transmitted to the governor for his consideration and that the governor's return of the bill was merely an act of courtesy which he had the power to either grant or refuse (*State ex rel Florida Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577; *State ex rel Schwartz v. Bledsoe*, 31 So. 2d 457). In the Bledsoe case, *supra*, the court's decision was based upon the fact that once the bill is approved by the legislature and signed by the designated legislative officers and thereafter transmitted to the governor, it was beyond the reach of the legislature.

In the instant situation, the governor did not approve the bills in question as required by the constitution, to wit: *signing them*, but merely transmitted them to the secretary of state, whose duty it is to keep the records of the official acts of the legislative department. Therefore, unless the 20-day period had elapsed, the gover-

nor could have recalled the bill from the secretary of state's office, thereafter approving or vetoing such bill.

In view of the above statements, I am of the opinion that since the legislature, by its final adjournment on June 5, 1959, prevented the governor from exercising the veto during the prescribed five-day period, the governor had 20 days from the date after adjournment within which to exercise his veto or approval. The governor did not formally approve the bills during that 20-day period, nor did he object to their becoming laws. Therefore, Chs. 59-575, 59-697, and 59-700, *supra*, became laws on June 25, 1959 (20 days after June 5), even though they were filed in the secretary of state's office on June 19 and 17, respectively.

Since the acts referred to in your inquiry contain an immediate effective date clause, the salaries provided by the acts in question became effective on June 25, 1959, for the remaining portion of the year 1959. The increases provided for by these bills will affect the salaries of the appropriate officers for the months of June through December, 1959, based upon the proportionate increase of the yearly salaries of such persons.

It should be noted that "statutes are regarded as prospective unless their language recognizes retroactive operation." (*Laney v. Board of Public Instruction for Orange County*, 150 Fla. 728, 15 So. 2d 748). As was pointed out above, all three acts contain an immediate effective date clause, thereby clearly indicating that the legislature did not intend that the salary provisions should be retroactive but that the increases would be effective as of the date said acts became laws. In light of the above statements, I am of the opinion that the salaries provided by Chs. 59-575, 59-697, and 59-700, *supra*, became effective on June 25, 1959.

060-20—January 26, 1960

#### STATE INSTITUTIONS

#### FUNDS OF INMATES OF INDUSTRIAL SCHOOLS—DEPOSIT OR INVESTMENT—§17, ART. IV, STATE CONST.;

§§965.01-965.06 AND 965.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

May funds belonging to inmates of the Florida Industrial schools, within the purview of §965.08, F. S., be invested in share accounts of, or deposited in, federal savings and loan associations?

Section 17, Art. IV, State Const., gives the board of commissioners of state institutions, of Florida, "supervision of all matters connected with such institutions in such manner as shall be prescribed by law." Certain of such institutions were, by Ch. 57-317, (now §§965.01-965.06, F. S.), divided and assigned into three divisions: (1) division of corrections, (2) division of child training, and (3) division of mental health. We are here concerned with the division of child training, which embraces the several industrial schools for boys and girls, the Florida farm colony, and the Sunland training center in Lee county. The said board of commissioners of state institutions, in addition to the appointment of a director for each such division, "may adopt and promulgate such regulations as it deems necessary for the proper conduct and administration of the institutions under its jurisdiction (§§965.03

and 965.05, F. S.). This includes the "division of child training schools," within the state institutions.

One of the duties of the board of commissioners of state institutions is to "administer money and other property received for the personal benefit of such patients and inmates" as may be under their jurisdiction and control. In carrying out these duties the board of commissioners may:

(a) Accept and administer, as a trust, any money or other property received for personal use or benefit of any patient or inmate;

(b) Deposit money so received in banks qualified as state depositories;

(c) Withdraw any such money and use the same to meet the current needs of the patient or inmate as they may exist from time to time;

(d) As such trustee to establish savings accounts, demand deposits, or invest in the manner authorized by law for fiduciaries such money not required to be used for current needs of the patient or inmate; and,

(e) To commingle such moneys for the purpose of deposit or investment.

(§965.08, F. S.). These powers and duties are fiduciary in nature and must be treated and observed as such.

"In order to carry out the provisions of this section (§965.08, F. S.), the board of commissioners of state institutions may delegate any of its herein enumerated powers and duties to the director of the division under whose supervision such patient or inmate comes, and any such director to whom such powers and duties are delegated is empowered, either personally or subject to his personal responsibility, through designated employees of his personal staff of the institutions under his supervision to exercise such powers or perform such duties." Before the director, to whom the duties and powers above mentioned are delegated by the board, may enter upon the performance of such duties and powers he "shall give a faithful performance bond payable to the governor or his successors in office in an amount to be fixed by the board of commissioners of state institutions." The validity of transactions by the director aforesaid may well depend upon the giving of the bond aforesaid and such bond should be required by the board as a condition precedent to any such transaction by the director (§965.08(5), F. S.).

The powers mentioned in the last paragraph hereof, subject to delegation by the board to the director, are not delegated by the statute to the director, but must be delegated by the board to be effective. The director's powers in this connection are limited to those specifically delegated by the board. The powers to be delegated by the board to the director aforesaid may be delegated by rules and regulations adopted pursuant to §965.05, F. S. The provisions of §944.22, F. S., appear to be limited to "prisoners," that is, inmates of the state prison system, which does not include inmates of the division of child training schools. The above described funds being fiduciary in nature, their investments must be in accordance with §§518.06-518.16, F. S., and similar statutes, which include investments in accordance with the prudent man rule (§518.11, F. S.). Investments by incorporated municipalities, certain political subdivisions, insurance companies, banks, etc., in sav-

ings and loan association accounts and deposits, are authorized by §§665.43-665.47, F. S.

We, therefore, hold that funds belonging to inmates of the Florida industrial schools, within the purview of §965.08, F. S., may be invested in share accounts of, or deposited in, federal savings and loan associations, when such investments are deemed proper and within the prudent man rule and approved for such investments by the board of commissioners of state institutions, of this state, pursuant to §965.08, F. S. What such funds may be invested in is primarily for determination by the board of commissioners of state institutions and not the division directors. Only when such powers are specifically delegated should the director determine the investment and then only within the limits of the delegation by the board. The director should make report to the board of commissioners of such investments made by him when made, and make progress reports concerning them from time to time.

060-21—January 29, 1960

**CRIMINAL PROCEDURE**  
**TESTIMONY AND PROCEEDINGS OF PRELIMINARY**  
**HEARING—EXPENSE FOR COURT REPORTER—**  
**COPIES—§902.11, F. S.**

To: J. H. Willson, County Solicitor, Polk County, Bartow

**QUESTIONS:**

1. Is the county liable for the per diem charged by a court reporter for attending a preliminary hearing before a committing magistrate at the request of counsel for the defendant when the testimony and proceedings of the preliminary hearing are reduced to writing by the said court reporter at the request of the prosecuting attorney?

2. Is the prosecuting attorney entitled to receive a copy of a transcript prepared by a court reporter under the circumstances described in the above question over the defendant's objection?

Section 902.11, Florida Statutes, provides as follows:

*902.11 Testimony of witnesses.—At the request of the prosecuting attorney the testimony of the witnesses and of the defendant, if he testifies, shall either be reduced to writing by the magistrate, or under his direction, or be taken in shorthand by a stenographer and transcribed. The magistrate shall give the defendant an opportunity to sign his deposition. If the testimony, or any part thereof, is reduced to writing, at the request of the prosecuting attorney a copy of such testimony shall be furnished free of cost to defendant or his counsel. (Emphasis supplied.)*

In order for the above-cited section of Florida Statutes to be activated so as to entitle the defendant to receive free of cost a copy of the transcript of the testimony taken before the committing magistrate, the *prosecuting* attorney must request that such testimony be reduced to writing. Such provision will not become operative upon such a request being made by either the magistrate or the defendant.



In this case, it does not appear that any such request was ever formally made. However, you advised me that at the close of the hearing, the assistant solicitor requested the court reporter to furnish your office a copy of the testimony and that no objection to such request was made by the counsel for the defendant. I interpret these facts to mean that your office requested that the testimony be reduced to writing and in order to carry out such request, assumed the employment of the court reporter whose attendance at the hearing was procured by the defendant.

The above-cited section of Florida Statutes provides for the testimony of witnesses at a preliminary hearing to be reduced to writing *at the request of a prosecuting attorney* by any one of the three following methods: (1) by the magistrate, or (2) under the direction of the magistrate, or (3) by being taken in shorthand by a stenographer and transcribed.

The third method for reducing the testimony of the witnesses at the preliminary hearing described above was utilized in this particular instance. Inasmuch as this statute contemplates that where a stenographer is used, such stenographer will take the proceedings in shorthand and later reduce such notes to writing, the cost of reducing the testimony to writing includes both the fee for typing the testimony charged by the court reporter and the fee charged for taking such notes, e.g., the court reporter's per diem.

Of course, if the testimony adduced at a preliminary hearing is not reduced to writing at the request of the prosecuting attorney and if such prosecuting attorney did not procure the attendance of a court reporter at such hearing, then in the absence of a special or local law providing otherwise, the county would incur no obligation by the attendance of a court reporter as such at the request of the defendant or his counsel.

Therefore, subject to the qualifications stated above, your first question is answered in the affirmative.

Inasmuch as the testimony in the instant case was reduced to writing at the request of and the expense of the county, it would seem clear that the defendant would not have any basis for objecting to your office obtaining a copy of such testimony. Your second question, is therefore, answered in the affirmative.

However, I should like to point out that it is possible for an official court reporter to perform his services for individuals under such circumstances as to be outside the scope of his official duties as a court reporter. Under such circumstances, the person who employed the court reporter would be the only one entitled to obtain a copy of the transcript typed by such reporter from his shorthand notes. Since that possibility was not raised by the facts surrounding the particular situation which you described, I do not believe that it would be appropriate to more fully explore it at this time.

060-22—January 29, 1960

**TAXATION**  
**TANGIBLE PERSONAL PROPERTY—TAX SITUS—**  
**§192.01; CH. 200, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

Is sugar, belonging to a nonresident, stored in a

warehouse in this state on January 1 of a tax year, subject to taxation for said year in this state?

Sugar, being tangible personal property, is subject to taxation in this state if it has its tax situs in this state on January 1 of the tax year. If taxable it is taxable under and pursuant to Ch. 200, F. S. Under §192.01, F. S., tangible personal property in this state and property belonging to persons residing in this state, without a tax situs elsewhere, is subject to taxation in this state, unless exempted by law. The court, in *Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, seems to have assumed that before property belonging to non-residents may be taxed in this state it must have acquired a taxable situs in this state. Unless the sugar mentioned in the above question has acquired a tax situs in this state it may not be taxed, but if it has acquired such a situs it may be taxed.

Before tangible personal property may be taxed in a state other than the domicile of the owner, it must have acquired a more or less permanent location in that state, and not merely a transient or temporary one. Generally, chattels merely temporarily or transiently within the limits of a state are not subject to its property taxes. Tangible personal property passing through or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. The state of origin remains the permanent situs of property for the purpose of taxation, notwithstanding the occasional excursion of the property to foreign parts. But property sent into a state by a nonresident, to be used or employed permanently there, must bear its fair share of the burden of taxation, although no one unit of such property is ever more than temporarily located within the taxing state. A criterion is whether the property is there for an indefinite time or some considerable definite time, and whether it is used or exists there to be used in much the same manner as other property is used in that community (51 Am. Jur. 468, §453).

In determining taxable situs involving the physical location of the property, it has been held that "actual situs" means a little more than simply the place where the property is, and excludes the idea of mobile personal property which happens to be in the course of transit through the taxing state, or the idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time, although it does not demand or necessarily involve the idea of permanency or permanent location in the taxing state, or permanency in the sense that it must be fixed like real property, but seems generally to be that it must have a more or less permanent location as distinguished from a transient or temporary one. Hence, as the habitual employment of the property in the state is the basis of jurisdiction to tax property belonging to a nonresident, it is sufficient for the establishment of a taxable situs for tangible personal property, when in the ordinary course of business that property is present and being used and employed

with a consistent continuity and not spasmodically and temporarily, or where the location of the tangible personal property in the state is of such permanence that the property can be regarded as a part of the property of the state (84 C. J. S. 225-6, §115).

Clearly, property in interstate transit through a state acquires no situs for purposes of taxation in the state, and property in a state only as an incident to its transfer to some other state is not taxable in such state. Delays in interstate transit may create a taxable situs in an intermediate state, depending upon the nature and duration of the delay—whether it is incident to the transportation of the property, or to accomplish some ulterior purpose of the owner not connected with such transportation. Property detained in transit to accomplish a particular purpose or object of the owner, other than its transportation to its ultimate destination, may be taxed in the state in which it is so detained, as having a taxable situs there (51 Am. Jur. 469-70, §455).

"Generally, property temporarily in a state is not taxable if it is owned by a nonresident, but it is taxable if owned by a resident." (84 C. J. S. 243, §120). "Tangible personal property of a nonresident, however, may be taxable when it is brought into the state for use." (84 C. J. S. 243, §120, note 26). Tobacco in a storage warehouse in Ohio held for future use in the manufacture of cigars or other tobacco products, was held to be temporarily in the state and not subject to taxation, in *General Cigar Co., Inc. v. Peck*, Tax Comm., 159 Ohio St. 152, 111 N. E. 2d 265.

The answer to the above stated question depends largely upon the purpose of the storage in Florida. If the property is intended for sale or use in Florida then it would appear that it has become part of the bulk of tangible personal property having a tax situs in this state; however, if its storage in Florida is merely a temporary rest in its movement into other states for use or sale in such states, then it has not acquired a tax situs in this state. The length of storage in the warehouse prior to January 1 of the tax year may raise a presumption that it has become a part of the bulk of property of the state, but would not be conclusive.

Should the taxing authorities determine, from the above and foregoing authorities and rules, that the sugar mentioned in the above question had acquired a tax situs in this state on or prior to January 1, then the said question should be answered in the affirmative, otherwise the answer is in the negative.

060-23—January 29, 1960

#### COURTS

##### INJUNCTIVE PROCEEDINGS UNDER §847.01(7), F. S.— COURT HAVING JURISDICTION—BY WHOM INSTI- TUTED; §9(2), ART. V, STATE CONST.

To: Warren Edwards, County Solicitor, Orange County, Orlando  
QUESTIONS:

1. Does a judge of a criminal court of record have injunctive power under §847.01(7), F. S.?
2. If question 1 is answered in the negative, who is the proper prosecuting attorney to call upon the cir-

cuit court of Orange county for the injunctive relief contemplated by said statute?

AS TO QUESTION 1:

Section 847.01(7), F. S., reads as follows:

*The injunctive powers of the courts of this state may be called upon by any county solicitor or state attorney to prevent a threatened violation of this section. When any such injunction is granted, the sheriff of the county wherein the articles affected by the injunction are located shall be directed to seize and impound such articles for disposition as directed by the court. Upon a final determination that any such articles are of a nature prohibited by this section they shall be ordered destroyed; otherwise they shall be returned to the owner thereof. (Emphasis supplied.)*

The said §847.01(7) does not undertake to confer any injunctive powers upon any court which were not already possessed by that court when said section went into effect. It merely authorizes the calling upon "the injunctive powers of the courts," meaning the injunctive powers possessed by the courts under other provisions of law. The criminal court of record of Orange county has no injunctive powers, its jurisdiction being limited to noncapital criminal cases by §9(2) Art. V, State Const., reading as follows:

SECTION 9. Criminal Courts of Record.—

\* \* \*

(2) JURISDICTION. The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

Therefore, question 1 is answered in the negative.

AS TO QUESTION 2:

The above-quoted §847.01(7) expressly authorizes the "county solicitor OR state attorney" to call upon the injunctive powers of the courts to prevent a threatened violation of §847.01. The circuit courts have injunctive powers. The result is that *either* the county solicitor of Orange county *or* the state attorney of the 9th judicial circuit may properly call upon the circuit court of Orange county for an injunction to prevent a threatened violation of §847.01 in said county. These comments will serve to answer question 2.

060-24—February 2, 1960

INDIANS

CRIMINAL JURISDICTION OVER INDIANS — CRIMES INVOLVING INDIANS — CRIMES COMMITTED ON INDIAN RESERVATIONS

To: Robert T. Adams, Jr., Assistant County Solicitor, Fort Lauderdale

QUESTION:

What jurisdiction, if any, has the state over crimes and criminal acts committed by one Indian against another, by an Indian against a non-Indian, by a non-Indian against an Indian, and on an Indian reservation in this state?

*Indians, relation to federal government.*—"In a general way



it may be said that the recognized relation between the Federal Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former. The condition of the Indians and of Indian tribes within the limits of the United States is anomalous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations or communities. Indeed, from the beginning of the government Indians and their tribes have been treated as 'wards of the nation' and 'in a state of pupillage.' The tribes have been regarded as 'dependent political communities,' and their relations to the general government have been such that they and their country have been considered by foreign nations, as well as by this nation, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their country, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. It should be pointed out, however, that the guardian-ward relationship between the federal government and Indians need not be perpetually continued; Congress may determine how and when it shall terminate." (27 Am. Jur. 545, §5). The recognized relation, between Indians and the general government, "is that between a superior and inferior, whereby the latter is placed under the care and control of the former . . . ." (*Choctaw Nation v. U. S.*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 306, text 315). "It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues *after the Indians are made citizens*" (*Williams v. Johnson*, 239 U. S. 414, text 420, 36 S. Ct. 150, 60 L. Ed. 358, text 360). During Spanish domination of what is now New Mexico, "the Indians of the pueblos were treated as wards requiring special protection" (*U. S. v. Sandoval*, 231 U. S. 28, text 44, 34 S. Ct. 1, 58 L. Ed. 107, text 114). It is presumed that the Spanish policy in Florida was the same.

*Indian tribes as state or nation.*—"Strictly speaking, the North American Indians do not and never have constituted 'nations' as that word is used by writers on international law, although in a great number of treaties they are so designated . . . Indian tribes are not foreign states or states of the United States, within the meaning of the section of the Constitution which extends the judicial power to controversies between two or more states, between a state and a citizen of another state, between citizens of different states, and between a state or citizens thereof and foreign states, citizens, or subjects. Nevertheless, they are, in a certain domestic sense and for certain municipal purposes, distinct political communities so long as the tribal relation is preserved and they have been uniformly so treated since the settlement of this country . . ." (27 Am. Jur. 545 and 546, §6). "The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien Nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state

of pupillage, resembling that of a ward and his guardian." (*Elk v. Wilkins*, 112 U. S. 94, text 99, 5 S. Ct. 41, 28 L. ed. 643, text 645). Indian tribes, "though in certain respects regarded as possessing the attributes of nationality, are held not to be foreign, but domestic dependent nations." (*Roff v. Burney*, 168 U. S. 218, text 221, 18 S. Ct. 60, 42 L. ed. 442, text 443).

*Trade with the Indians.*—"From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. . . . The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the United States and provide that all intercourse with them shall be carried on exclusively by the government of the Union. . . . The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception imposed by the irresistible power, which excluded them from intercourse with any European potentate than the first discoverer of the coast of the particular region claimed. . . . The very term 'nation' so generally applied to them, means 'a people distinct from others.'" (*Worcester v. Georgia*, 31 U. S. 515, text 556-559, 8 L. ed. 483, text 499 and 500).

*Status of Indian treaties.*—The Seminole nation of Indians, by the treaty between the U. S. and said Seminole nation of Indians, made and concluded at Payne's Landing on the Ocklawaha river, on May 9, 1832, in article "I" thereof, "*relinquished to the United States* all claim to the land they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river, it being understood that an additional extent of country, proportioned to their numbers, will be added to the Creek territory, and that the Seminoles will be received as a constituent part of the Creek nation, and be readmitted to all the privileges as a member of the same." This article of the treaty of Payne's Landing was recognized and approved in the treaty made between the U. S. and the Seminole nation of Indians, made at Fort Gibson, Ark., on March 28, 1833. These treaties appear to have been made with the advice and consent of the U. S. senate as evidenced by a senate resolution of April 8, 1834. Presuming, but not deciding, the force and effect of these treaties, it is presumed that the Indian reservation in this state, now occupied by the Florida Indians, is statutory reservation or reservations, made pursuant to statutory authority.

*Indian tribes, powers of.*—"In conformity with the theory that Indian tribes are distinct political societies, they have been recognized by the Federal Government as having the right to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States. This right of self-government is not lost merely by submitting to the protection of the United States and agreeing that Congress shall manage the affairs of the tribe

....” (27 Am. Jur. 547, §7). “Two or more Indian tribes may consolidate and become merged into one . . . Indian tribes may also divide into separate bands by agreement . . . or they may cease to exist by the complete withdrawal of their members from the tribal relation.” (27 Am. Jur. 547, §8). “Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them. In that year, however, Congress by statute, declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, instead of by treaty.” (27 Am. Jur. 547, §9). These observations show the relationship of Indians and Indian tribes or nations with the U. S. and the states, generally. We, therefore, pass on to a consideration of the application of state criminal statutes and laws to Indians and their reservations.

*Status of federal government as to Indians.*—“Not only does the Federal Constitution expressly authorize Congress to regulate commerce with the Indian tribes (clause 3, §8, Art. I), but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection of all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired and whether within or outside the limits of a state . . .” (27 Am. Jur. 568, §42). “In general it may be said that the United States is fully empowered, whenever it seems wise to do so, to assume full control over the tribes and their affairs, to prescribe the courts in which all controversies to which an Indian may be a party shall be submitted, to determine who are citizens of a tribe . . . general acts of Congress do not apply to Indians, unless the acts are so expressed as to manifest clearly an intention to include them” with some exceptions not here material. “It has also been held that the United States has power to punish all offenses committed by or against Indians within Indian reservations, to prohibit all trade with Indians except under license . . .” (27 Am. Jur. 568 and 569, §43).

“The jurisdiction of the Federal Government over Indian tribes and over the members of such tribes while they are on Indian reservations is exclusive. Consequently, such Indians, while they are on their reservations cannot be controlled or governed by the laws of the state within which the reservations are located . . . Although an Indian becomes a full-fledged citizen of the United States, yet if he continues to live on a reservation, he is subject to the exclusive jurisdiction of the United States . . . Indians, although living on a reservation and maintaining tribal relations, are amenable to the laws of the state when they are off the reservation.” However, it is within the power of congress to provide that the laws of a state shall extend over and apply to Indian country (27 Am. Jur. 572, §47). The original policy of the U. S. “was to give the Indians themselves jurisdiction of crimes committed by one Indian against another of the same tribe, and accordingly, it was uniformly held that the United States courts had no jurisdiction of such crimes. This rule, however, generally extended only to Indians by race,” and not to non-Indians adopted into the tribe. “This original policy was changed in 1885, when congress con-

ferred jurisdiction on the federal courts of the more serious crimes committed by an Indian against another Indian or other person within the limits of an Indian reservation when the reservation was located within a state, and on the territorial courts when the reservation was located within the limits of a territory." (27 Am. Jur. 573, §50). The last mentioned legislation appears to have been upheld (*Donnelly v. U. S.*, 228 U. S. 243, 57 L. ed. 820, 33 S. Ct. 449; *U. S. v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 S. Ct. 1109).

"The exclusive jurisdiction of the Federal courts over Indian reservations within state limits extends not only to crimes committed by an Indian, but also to crimes committed on the reservation against an Indian" by a non-Indian. "Unless restricted by a treaty with the Indian tribe or by the act admitting a state into the Union or by some other act of Congress then in existence, the state jurisdiction extends over the territorial limits of an Indian reservation so as to apply to all crimes committed thereon by persons not members of the tribe against other non-members of the tribe . . ." (27 Am. Jur. 574, §51). "Indians, though belonging to a tribe which maintains the tribal organization, occupying a reservation within a state, are amenable to state laws for murder or other offenses against such laws, committed by them off the reservation and within the limits of the state, even though the crime is committed against an Indian of the same tribe, the act of congress of 1885 having deprived the tribal courts of jurisdiction in such cases. Obviously, it follows that crimes committed outside a reservation by white persons against Indians and crimes committed by or against an Indian who has abandoned his tribal relations are also punishable under the laws of the state where such crimes are committed." (27 Am. Jur. 575, §52).

*The above mentioned act of congress of 1885 now appears as §1153, title 18, of the U. S. code, and embraces the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny, committed by one Indian against the person or property of another Indian or other person in Indian territory. "Indian country" or territory, as used in said §1153, title 18, is defined in §1151, of said title 18. This definition is in connection with the protection extended by the U. S., as guardian, "over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." (See *U. S. v. McGowan*, 302 U. S. 535, 58 S. Ct. 286, 82 L. ed. 410, text 412). The fundamental purpose and intent of congress, in its enactment of the act of 1885, and its assuming a guardianship over the Indians, "has been the protection of a dependent people." (See *U. S. v. McGowan*, supra). The purpose of the government's guardianship over the Indians is not the protection and control of territory as such, but the protection of the Indians themselves. The protection is the protection and control of the Indians themselves, not supervision over territory (27 Am. Jur. 570 and 571, §45; 42 C. J. S. 790, §75; 42 C. J. S. 793 and 794, §77; 21 Words and Phrases, "Indian Country," 123-132, and supplement; *U. S. v. Celestine*, 215 U. S. 278, 30 S. Ct. 98, 54 L. ed. 195, text 197; Anno, in 8 L. ed. 484-486).*

*Indians as wards of the federal government.*—The authority of the U. S. over crimes committed, by other than Indians, in Oklahoma was ended by the grant of statehood "but authority in respect of crimes committed by or against Indians continued after



the admission of the state as it was before . . . in virtue of the long settled rule that such Indians are wards of the nation in respect to whom there is devolved upon the Federal government 'the duty of protection and with it the power.' " The guardianship of the "United States over the Osage Indians has not been abandoned; they are still wards of the nation . . . , and it rests with Congress alone to determine when that relation shall cease." (U. S. v. Ramsey, 271 U. S. 467, 46 S. Ct. 559, 70 L. ed. 1039, text 1040). "In the absence of provisions to the contrary, the lands embraced therein (in a state) occupied by Indian tribes are a part of the state or territory and subject to its jurisdiction, *except* as far as concerns the government and *protection of the Indians themselves* . . . in which respect the jurisdiction of the United States is exclusive" (42 C. J. S. 781, §72; see also *Utah and Northern Railway Co. v. Fisher*, 116 U. S. 28, 6 S. Ct. 246, 29 L. ed. 542). "In the United States, what acts committed by or against Indians, or in the Indian country, constitute criminal offenses and are punishable as such depends largely on statutory provisions, generally contained in acts of Congress, it being within the power of Congress to enact laws on this subject." (42 C. J. S. 789, §75; see also *U. S. v. Thomas*, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276, text 279). In *U. S. v. Thomas*, *supra*, it was stated that "Indian tribes are wards of the nation. They are communities dependent upon the United States." See also *Worcester v. Georgia*, 31 U. S. 515, 8 L. ed. 483, text 499.

*Citizenship of Indians, effect of.*—Previously, Indians were not considered as citizens of the U. S.; however, they appear to have been given citizenship under federal acts of 1924, 1940 and 1953 (§1401, title 8, U. S. code). Under these statutes Indians are now considered nationals and citizens of the U. S. (42 C. J. S. 649 and 650, §4), and of the state wherein they may reside (*U. S. v. Hester*, CCA 10th, 137 Fed. 2d 145; *Deere v. State*, DC NY., 22 Fed. 2d 851, and 32 Fed. 2d 550). For the purposes hereof we assume that the Indians residing in Florida are citizens thereof, however, "there is no incompatibility between tribal membership and United States citizenship," or state citizenship. (*Halbert v. U. S.*, 283 U. S. 752, 51 S. Ct. 615, 75 L. ed. 1389, text 1396). "Citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." (*U. S. v. Sandoval*, 231 U. S. 28, text 48, 34 S. Ct. 1, 58 L. ed. 107, text 114). The attaining of citizenship by an Indian "does not of itself dissolve or terminate an existing tribal relation and affiliation" (42 Am. Jur. 650, §4). ". . . it is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the Federal government . . . . It rests with Congress to determine when the guardianship relation shall cease." (*Creek County v. Seber*, 318 U. S. 705, 63 S. Ct. 920, 87 L. ed. 1094, text 1104). "It may be taken as the well settled doctrine of this court that Congress, in pursuance of the long-standing policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." (*Tiger v. Western Investment Co.*, 221 U. S. 286, text 315, 31 S. Ct. 578, 55 L. ed. 738, text 749).

*Indians, civil actions, jurisdiction.*—In *Williams v. Lee*, 358

U. S. 217, 79 S. Ct. . . . , 3 L. ed. 2d 251, the court held a state court without jurisdiction of a civil action against reservation Indians for goods sold them by a non-Indian operating a store on an Indian reservation, where the tribal courts exercised jurisdiction of civil actions by outsiders against Indian defendants; there being no federal legislation giving state courts jurisdiction of such controversies. Indian "reservations are a part of the state within which they lie and her laws, civil and criminal, have the same force and effect therein as elsewhere within her limits, *save that they have only restricted application to Indian wards.*" (Surplus Trading Co. v. Cook, 281 U. S. 647, text 651, 50 S. Ct. 455, 74 L. ed. 1091, text 1094).

*Indian country or reservation.*—It has long been the theory in this country "that Indian tribes are distinct political societies." Such tribes have been recognized "as having the right to make laws and regulations for the government and protection of their persons and property," so long as such laws are "not inconsistent with the" federal constitution and laws. The duration of such right of self-government appears to be at the discretion of the federal government through congress; and congress may assume full control over the Indians whenever such action appears advisable (27 Am. Jur. 547, §7). The court, in *Gritts v. Fisher*, 224 U. S. 640, text 642, 32 S. Ct. 580, 56 L. ed. 928, text 931, speaking of the Cherokee tribe of Indians, remarked that "as in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, *to assume full control over them and their affairs.* . . ." Until 1871, when congress decided to govern Indian tribes through act of congress instead of treaties, "Indian tribes were recognized by the U. S. as possessing the attributes of nations to the extent that treaties were made with them" (27 Am. Jur. 547, §9). Spain and England, while they held jurisdiction over the Floridas, entered into numerous treaties with the Indians, some of them relating to the lands to be occupied by the Indians. These treaties were recognized as binding obligations by both Spain and England. (*Mitchell v. U. S.*, 34 U. S. 711, 9 L. ed. 283). The court in this case made the statement (L. ed. 298) that "Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guaranty of treaties . . ." The authorities indicate that Indian self-government was based upon tribal relation and not on federal Indian reservations as such, although the Indian reservation as established under federal authority has often been used for the purposes of fixing the extent of boundary of the Indian tribe. The Indians themselves, not the Indian reservations, are the wards of the federal government, inherited from the English and Spanish governments as prior governments over the Floridas. Although Indian reservations have been provided by Florida under Chs. 7310, 16175 and 17065, acts of 1917, 1933 and 1935, respectively, such reservations are for the use of Indian tribes and not individual Indians as such. There would be little reason for holding that Indian tribes residing on federal reservations were entitled to self-government while the Indian tribes residing on state reservations are not entitled to self-government.

From the above and foregoing we reach the following conclusions as to the above stated question:

1. Except as to murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny, *which, by the federal statutes*, are placed under the jurisdiction of the federal district courts, crimes and criminal acts committed by one Indian against another Indian, on an Indian reservation occupied by an Indian tribe, are within the jurisdiction of the tribal courts and not the state courts. Where the Indians maintain tribal courts having jurisdiction, where there are no tribal courts, state courts may hear and determine. Federal statutes regulate the sale of intoxicants on Indian reservations.

2. The same rule applies to crimes and criminal acts committed by an Indian against a non-Indian, or by a non-Indian against an Indian, on such an Indian reservation.

3. Crimes and criminal acts, committed on an Indian reservation, by a non-Indian against a non-Indian, are vested in the state courts.

4. Indians, though belonging to a tribe which maintains tribal relations upon an Indian reservation, are amenable to the state courts for crimes and criminal offenses committed by them off the said reservation and within the state.

5. Jurisdiction of civil actions and proceedings has not been considered herein, although some such cases may have been mentioned in our arguments.

060-25—February 5, 1960

**REGULATION OF VOCATIONS AND PROFESSIONS  
BOARD OF NATUROPATHIC EXAMINERS—RENEWAL OF  
LICENSE UNDER CHAPTER 59-164 (§462.022, F. S.)—  
CH. 462, F. S.**

To: *Julio Gavilla, Secretary-Treasurer, State Board of Naturopathic Examiners, Tampa*

**QUESTION:**

**What shall constitute a two-year residency under the provisions of Ch. 59-164?**

Chapter 59-164, relating to the practice of naturopathy in Florida provides, among other things, as follows:

... Only those naturopathic physicians that ... have been residents for two years in the state of Florida prior to the enactment of this law may renew their license.  
(Emphasis supplied.)

The effective date provided in the act was July 1, 1959. Therefore, in order to comply with the requirements of the foregoing provision of the license renewal law, the applicant must have been a resident of the state for at least two years immediately prior to July 1, 1959.

Your question necessitates a construction of both residence and domicile. Domicile denotes a fixed permanent residence, to which when absent, one had the intention of returning. Residence simply indicates the place of abode, whether temporary or permanent (Minick v. Minick, 149 So. 483). There is no definite period of time necessary to create a domicile and one day may be sufficient provided the intention to create a domicile exists. The habitation may not be continuous and temporary absence does not affect it (17 Am. Jur. 604). To abandon one's domicile there must be a choice of a new domicile with the intention that it be the principal

and permanent residence, and the rule is well settled that *a domicile once established continues until it is superseded by a new domicile and that the old domicile is not lost until a new one is acquired* (See *Minick v. Minick*, 149 So. 483, 111 Fla. 469; *Wade v. Wade*, 113 So. 374, 93 Fla. 1004; A. G. O. 053-330).

The supreme court of Florida said in *Minick v. Minick*, 149 So. 483:

"Residence" as used in various statutes has been considered synonymous with domicile . . . Generally where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent. (Emphasis supplied.)

From the foregoing you can readily see that it is sometimes difficult to determine with accuracy whether a person has residence in the state because it includes a determination of what is in the mind of the person involved, that is, his actual intention in regard to his residence or home or domicile. Even that is sometimes complicated by the fact that certain persons are actually uncertain about their own intentions as to home and residence. A person's statement, as to his residence and his intentions in that respect, is important if it speaks the truth. Residence, in the legal sense of the word, is established or proven by certain indicia which in general are those acts and that conduct which, according to human experience, are associated with one's residence in a community, or which usually accompany a change of residence from one locality to another. Some of these are: the purchase of a home; the renting of a home; the purchase of other property in the locality claimed as residence; going into business or accepting permanent employment; affiliation with churches, clubs, civic groups, or other organizations in his locality; the payment of taxes on personal property, or other property; registering and voting; his future plans; admissions, declarations, or other statements, orally or in documents, which might indicate present and future intentions as to residence; to what extent he may have severed his connections or interest in persons, property or activities, at his former legal residence. None of these things are necessarily controlling, and some have more weight than others, depending on all of the facts in each particular case. (See A. G. O. 053-329.)

In the light of the foregoing, I am inclined to think that in construing Ch. 59-164, supra, the term "residence" should be considered synonymous with "domicile" as defined by our court in *Minick v. Minick*, supra, in that the word "resident" as used in said Ch. 59-164 refers to persons "domiciled" in Florida for at least two years prior to July 1, 1959. Therefore, temporary absence from the state, with no intent or actual abandonment of the permanent domicile establishment in the state, would not disturb the initial showing of residence and the presumption of the continuous maintenance thereof, especially in the absence of any manifestation of intent to the contrary.

Your question is answered accordingly.

On July 24, 1959, this office rendered opinion 059-143 to you as the secretary-treasurer of the Florida state board of naturopathic examiners on the following question:

What are the requirements under Ch. 59-164 for regis-



tration in this state as a naturopathic physician subsequent to July 1, 1959?

I do not believe the views set forth herein are inconsistent with the conclusion reached in my opinion 059-143, as the foregoing merely suggests a legal and practical basis for determining the term "resident."

However, in view of the fact that the final determination of the question of residence, as well as the other requirements for license renewal set forth in Ch. 59-164, is under the jurisdiction of the Florida state board of naturopathic examiners, no attempt is made here to determine the status of the application of Dr. August Schreiber, or Dr. Nissin S. Hanoka. However, it is suggested that the board require full, complete and detailed information be furnished it relative to the applicant's compliance with the requirements as set forth in Ch. 59-164.

060-26—February 5, 1960

**CRIMINAL PROCEDURE**  
PROSECUTING ATTORNEYS, COUNTY COURTS—INFORMATION—§§34.12 AND 32.18, F. S.

To: *James W. West, Prosecuting Attorney, Sumter County, Bushnell*

**QUESTION:**

Pursuant to §34.12, F. S., should the county court prosecuting attorney's signature on each information be sworn to before a notary or some officer qualified to take acknowledgments?

Section 34.12, F. S., provides as follows:

The prosecuting attorney shall prosecute all criminal cases before the county court, and *shall sign all informations filed in said court by him*, and do and perform all the duties required of a prosecuting officer. (Emphasis supplied.)

In the case of *Williams v. Albritton*, Fla., 190 So. 423, the supreme court of Florida ruled that under the declaration of rights, and §32.18, F. S., informations must be verified under oath, but under this section relating to prosecutions in county courts, which have no jurisdiction in the trial of felonies, informations filed by a prosecuting attorney in a misdemeanor prosecution need not be verified under oath.

Your question as raised above is, therefore, answered in the negative.

060-27—February 11, 1960

**TAXATION**  
HOMESTEAD TAX EXEMPTION—CONTRACTS OF PURCHASE—REQUIREMENTS—§192.13, F. S., §7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

When is a vendee in possession of real estate, under a duly recorded bona fide contract to purchase, entitled

to homestead tax exemption under §7, Art. X, State Const.?

Before a person may be entitled to homestead tax exemption under §7, Art. X, State Const., he must have either the legal title, or the beneficial title in equity, to the real estate claimed as exempt, and must reside thereon and in good faith make the same his permanent home, or the permanent home of another or others legally or naturally dependent upon him. The said section recognizes a *beneficial title in equity* as a proper basis for a homestead tax exemption claim. The above stated question poses the question of whether or not a contract for the sale and purchase of real property vests in the vendee a *beneficial title in equity*.

In equity "a binding and enforceable contract for the sale and purchase of real estate is recognized, for most purposes, as if it were specifically executed and performed. The purchaser thereunder has a valid and subsisting interest in the property that is the subject matter of the contract. As a general rule, he is regarded in equity as the owner, or as the equitable owner, or as the beneficial owner; and the contract vests in him an equitable title to the realty . . . ." (91 C. J. S. 1009-1010, §106). "From the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase-money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance." (*Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658). The relation created by such a contract is that of vendor and vendee, which vests in the vendee an equitable title. (*Lafferty v. Detwiler*, 155 Fla. 95, 20 So. 2d 338, text 343). "The purchaser's equitable title does not depend on a conveyance;" it arises through the doctrine of equitable conversion (91 C. J. S. 1011-1012, §106). The vendee is regarded as the real beneficial owner, even though he has not paid the purchase price (*Atlantic Beach Improvement Corp. v. Hall*, 143 Fla. 778, 197 So. 464, text 466).

Section 192.13, F. S., recognizes the provision in the constitution permitting homestead tax exemption upon the beneficial title in equity of a vendee, and requires that the contract be a bona fide one for the purchase of real estate, and that it be a matter of public record in the county where the said real estate is located. This section appears to be within the constitutional authority that "the legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said (homestead tax) exemption," contained in said §7, Art. X, State Const. Whether an alleged vendee under a written instrument concerning real property holds a beneficial title in equity to the lands therein described depends upon the terms of the instrument.

However, "an executory contract of sale does not divest the legal title of the vendor, but merely confers on the purchaser an equitable title, . . . it follows that unless the contract provides otherwise the right of possession remains in the vendor, and the purchaser does not merely by virtue of his contract of purchase acquire any right immediately to enter on, or take possession of, the property." (92 C. J. S. 153-154, §284). It seems that only in Alabama is a contract for the sale of real property held to give a right

of possession, in the absence of a provision for possession (92 C. J. S. 154, §284, note 80). While the vendee under a contract to sell and convey real estate "is considered to be the equitable owner, the legal title is in the vendor until the contract is performed and a conveyance executed, and many cases support the general rule that the right to possession follows the legal title; that if there is no agreement, express or implied, in a contract for the sale of real estate, that the vendor shall deliver possession of the premises before full payment of the purchase price, the purchaser is not entitled to the possession; and that a mere contract for the sale of real estate which provides that if the purchaser complies with his part of the contract and pays the purchase price as agreed, the vendor will then deed the property, raises no legal inference that possession of the property is to be given before the deed is executed. . . ." (55 Am. Jur. 808 and 809, §385). To the same effect see Anno. in 28 A. L. R. 1069-1089 and 56 A. L. R. 2d 12.

It appears from your file handed us with the request for opinion that the particular application for homestead tax exemption involved is predicated upon a contract between a seller, by and through an agent, and a purchaser, wherein the lands to be sold and conveyed are described and the consideration for the purchase and terms of payment are mentioned. The contract is made subject to the title being merchantable, with a prospective closing of the transaction on or before May 1, 1959. The contract is dated April 10, 1959, and was recorded, in the county wherein the lands lie, on April 21, 1959. It is specified in paragraph numbered "9" of the agreement that "no agreements, unless incorporated in this contract shall be binding upon the Agent, Buyer or Seller." Paragraph numbered "11" of the agreement also provides that "if the improvements are damaged by fire or other casualty before the closing hereunder and can be restored to substantially the same condition as now within a period of 60 days thereafter, the seller shall restore the improvements . . . but if such restoration cannot be completed within that time the contract shall be declared cancelled." Said paragraph "9" seems to make the agreement the full and only agreement between the parties; this being true, if the purchaser is entitled to possession, such possession must be under some other agreement, as the agreement itself gives no right of possession. The agreement that the seller will stand improvements to correct fire and casualty damage seems contrary to possession by the purchaser (see above quotation from *Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658).

From the above and foregoing it is evident that the purchaser's possession of the property, if so in possession, is not under and pursuant to the purchase contract, but under some other arrangement, between seller and purchaser, as lessee, licensee, or otherwise, of the seller, so that the purchaser's possession is the possession of the owner instead of the purchaser under a contract of sale. The possession is not that of an owner of a beneficial title in equity, but of a lessee, licensee, or like relation; an agreement of possession not of sale. The applicant has not shown himself or herself entitled to the claimed exemption, upon the file before us. Should the applicant produce other papers supplemental or in lieu of those in the file, prior to close of the time for making homestead tax exemption applications, they should be considered.

Generally, a vendee in possession of real estate, under a duly

recorded bona fide contract to purchase, in order to be entitled to homestead exemption must show that he is vested with a beneficial title in equity to the property, by reason of said contract, and that his possession is under and pursuant to such contract and not otherwise.

060-28—February 12, 1960

#### TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—SUBSTITUTE MORTGAGES, SAME DEBT—§§199.02(3) AND 199.11, F. S., §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Where several mortgages, each encumbering separate parcels of land, are substituted for a single mortgage, encumbering the same separate parcels of land in solidum, both the original and substitute mortgages being to secure the same indebtedness, are the substitute mortgages liable for class "C" intangible personal property taxes, where such taxes were paid when the original mortgage was recorded?

On Oct. 4, 1958, "A" corporation, being then indebted to "B" corporation in the principal sum of \$2,432,742.01, made, executed and delivered its mortgage encumbering 12 separate parcels of real property (seven in Florida, three in Georgia, and one each in North Carolina and Tennessee) which mortgage was duly recorded in the counties of Florida wherein any of said parcels of land lie. Class "C" intangible personal property taxes, imposed under Ch. 199, F. S., were paid upon the recording of the said mortgage in Florida.

On or before Jan. 1, 1960, the parties to the said mortgage agreed and stipulated for the substitution of separate mortgages encumbering each of the said parcels of real property; each of said substitute mortgages to secure the payment of the indebtedness secured by the said original mortgage. At the time of the said agreement to substitute separate mortgages for the said general mortgage the indebtedness has been reduced from said \$2,432,742.01, to \$2,270,560.00. The 12 separate mortgages, given in lieu of the said original mortgage, were made, executed and delivered on Jan. 1, 1960. It is stipulated in the separate mortgages that "it is desired to divide the 1958 mortgage into separate mortgages, each covering a separate parcel of real property and each securing part of the unpaid amount of the indebtedness above stated"; that is the unpaid portion of the indebtedness secured by the original mortgage.

These substitute separate mortgages apportion the unpaid portion of the original indebtedness secured by them among the several parcels. For example, the separate mortgage encumbering parcel 2, as described in the exhibit to the original mortgage, apportions \$59,587.20 of the said original indebtedness to said parcel 2. This substitute or separate mortgage then provides that the "mortgagor will duly and punctually pay to the mortgagee, at the principal office of the Chemical Bank of New York Trust Company in New York, . . . the principal sum of \$59,587.20 in installments beginning July 1, 1960, and continuing until the payment of the balance due on July 1, 1973." The substitute or separate mortgages, encumber-



ing separate tracts of land, refer to themselves as supplemental or amendatory of the original mortgage.

In *Federal Land Bank v. Godwin*, 107 Fla. 537, 145 So. 883, text 885, a new mortgage was given to secure the indebtedness secured by a former mortgage, duly recorded, as a means of extending the time for payment of the indebtedness, and the former mortgage was satisfied. The court, concerning this transaction, said that "both mortgages were between the same parties, covered the same lands, were for the same amounts, except as to accrued interest and cost, which were included in the new mortgage, and the giving of the new and the attempted discharge or satisfaction of the old mortgage were parts of the same transaction." It was held that the new or substitute mortgage was in law merely an extension of the indebtedness secured and that the new mortgage "retained its position of priority over the Alderman mortgage," a mortgage made and recorded between the making of the original and substitute mortgages. The original and substitute mortgages here under consideration appear to be of the same nature. The substitute mortgages appear to be within the rule discussed in 59 C. J. S. 342-343, §281, wherein it is stated that:

As a general rule, entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or part of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor.

We therefore feel that the substitute mortgages are in the nature of a continuation of the original mortgage and that they secure the same indebtedness as that secured by the original mortgage. The substitute mortgages may be said to be supplemental to the original one.

Class "C" intangible personal property taxes are authorized under §1, Art. IX, State Const., which provides in part that "as to any obligation secured by mortgage, deed of trust, or other lien, the Legislature may prescribe an intangible tax . . . which shall be payable when such mortgage . . . is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations." Section 199.02(3), F. S., enacted pursuant to above mentioned constitutional provision, provides that "Class 'C' intangible personal property is hereby defined as being *all notes, bonds and other obligations* . . . for payment of money which are secured by mortgage, deed of trust or other lien upon real property. . . ." The tax is on the obligation secured by mortgage, deed of trust or other lien, not on such mortgage, deed of trust, or other lien. Section 199.11, F. S., provides that the taxable value of class "C" intangible personal property is "the principal amount of the indebtedness, evidenced by such obligation, which tax shall be due and payable" when the mortgage, deed of trust or lien is presented for recordation. Class "C" intangible personal property taxes are, therefore, imposed upon the obligation secured by the mortgage, not on the mortgage itself. Although the tax may be referred to as a recording tax, it is imposed upon the indebtedness, not the mortgage. Before the mortgage may be legally recorded in Florida the class "C"

intangible personal property taxes on the obligation secured must be paid.

We therefore answer the above stated question in the negative, where the mortgages are in effect merely revisions, extensions or supplemental to the original mortgage so as to be within the rule announced in *Federal Land Bank v. Godwin*, *supra*, otherwise the answer must be in the affirmative.

060-29—February 12, 1960

### MOSQUITO CONTROL

TERMS OF OFFICE OF MOSQUITO CONTROL DISTRICT OFFICERS—CHS. 390 AND 388, §§388.061, 388.101 AND 388.121; §14, ART. XVI AND §14, ART. XVIII, STATE CONST.

To: H. T. Cook, County Attorney, Bunnell

#### QUESTION:

What election procedures should be followed in electing mosquito control district officers of the East Flagler mosquito control district to prevent lapses in office and correct cycling in view of the fact that the 1959 state legislature repealed Ch. 390, F. S.?

Chapter 390, F. S., provided an alternative method of creating mosquito control districts and now that Ch. 390, F. S., has been repealed it would appear that the commissioners should be guided by the provisions of Ch. 388, F. S., which also provides for the establishment of mosquito control districts.

In the instant situation, you point out that the terms of three of the mosquito control board members will expire on July 15, 1960, under the provisions of the old law, §390.12, F. S. Section 388.101, F. S., provides for the election of officers of mosquito control districts for terms of four years, beginning with the general election, subsequent to the formation of the district. The apparent intent expressed in §§388.101 and 388.121, F. S., is that said board members are to be elected and take office at the time of the general elections (43 Am. Jur. 15, Public Officers, §155).

Section 14, Art. XVIII, State Const., providing for the terms of county officers to begin on the first Tuesday after the first Monday in January, does not appear to be applicable to the district offices in question (*Town of Palm Beach v. West Palm Beach, Fla.*, 55 So. 2d 566; *Ball v. Branch*, 154 Fla. 57, 16 So. 2d 524; Advisory Opinion to the Governor, 147 Fla. 148, 2 So. 2d 272; *State ex rel Landis v. Wheat*, 103 Fla. 1, 137 So. 277). This being the case, it would appear now that since the terms of the present board members expire on July 15, 1960, there would be a vacancy in office until the general election which will be held on Nov. 8, 1960.

While §14, Art. XVI, State Const., is not applicable to district officers (*Smith v. Hamilton*, 123 Fla. 381, 166 So. 742), it is the general rule that officers do hold over until their successors are elected and qualified (43 Am. Jur. 20, §162; Advisory Opinion to the Governor, Fla., 92 So. 2d 513; *Walker v. Hughes*, 42 Del. 447, 36 A. 2d 47, 151 A. L. R. 946).

In this instance it might be well to request the governor to reappoint the incumbents or any other appropriate persons for the term beginning July 15, 1960, and ending Nov. 8, 1960. (See *State ex rel. Gibbs v. Rogers*, 141 Fla. 237, 193 So. 435.) This would re-

move any doubt as to the validity of the acts of the mosquito control board members and allow their successors to begin their terms on the proper cycle.

Under §388.061, F. S., only freeholders are allowed to participate in subsequent elections of commissioners, not all electors of the district.

060-30—February 16, 1960

**ELECTORS AND ELECTIONS**  
**QUALIFYING DATES FOR COUNTY OFFICERS—**  
**§§99.061(3) AND 15.13, F. S., CH. 59-84**

To: *R. A. Gray, Secretary of State, Tallahassee*

**QUESTION:**

**What are qualifying dates for county officers?**

The legislature, through the recent enactment of Ch. 59-84, revised §99.061(3), F. S., and in so doing it appears that the qualifying dates for county officers were inadvertently omitted.

The intent of the legislature is the pole star by which the courts must be guided in construing statutes (*Ervin v. Peninsular Tel. Co.*, Fla. 53 So. 2d 647). Statutes must be construed so as to avoid absurd results (*Johnson v. State of Florida*, Fla. 91 So. 2d 185).

When the legislature's intent can be ascertained with a reasonable degree of certainty, words may be supplied so as to avoid absurdity or inconsistency with intentions (*Haworth v. Chapman*, 113 Fla. 591, 152 So. 663).

The new law as enacted sets out that the qualifying dates for county officers shall be "during the period prescribed by law." At the time of enactment, the time prescribed by law was as set out in the 1957 Statutes, and it must be presumed that these are the dates the legislature had in mind at the time it enacted Ch. 59-84. In this instance the legislative intent appeared so obvious that the revisors supplied the omission before the statutes were printed. You have indicated in your inquiry that you concur with the dates so supplied. Inasmuch as you are by law, §15.13, F. S., charged with the duty of supervising and administering the election laws, your interpretation in this instance is of considerable persuasive force (*L. B. Smith Aircraft Corp. v. Green*, Fla. 94 So. 2d 832). This, coupled with what has already been said, leads to but one conclusion, that being that the legislature inadvertently omitted the dates for qualifying by candidates for county offices and said dates were properly taken from the 1957 Statutes and carried forward by the revisors.

This being the case, your question is answered as follows:

Candidates for county offices should qualify between noon of the 63rd day prior to the first primary and noon of the 49th day prior to the date of the first primary. Specifically, candidates for county offices may start qualifying at noon of March 1, 1960, and may qualify up to and until noon on March 15, 1960.

060-31—February 17, 1960

### CRIMES

#### PROHIBITED INSTALLATION OF OPERATION OF RADIO EQUIPMENT—CONSTRUCTION OF §843.16(2), F. S.

To: *William D. Hopkins, State Attorney, Tallahassee*

#### QUESTION:

Does the exemption contained in §843.16(2), F. S., viz., "provided, nothing herein shall be construed to affect any radio station licensed by the federal communications system," apply not only to radio stations but to television stations as well?

In order to determine the scope of the exemption contained in §843.16(2), F. S., it is, of course, necessary to determine what is a radio station licensed by the federal communications system.

In the federal communications act, 47 U. S. C. A., §153(k), radio station is defined as follows:

(k) "Radio station" or "station" means a station equipped to engage in *radio communication* or radio transmission of energy. (Emphasis supplied.)

In 47 U. S. C. A., §153 (b), radio communication is defined as follows:

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

In considering the above two definitions together, it appears that a radio station is defined as a station equipped to engage in radio communications, e.g., the transmission by radio of, among other things, pictures and sounds of all kinds. Since the definition of radio communication includes television as a form of radio communication (See *Allen B. Dumont Lab. v. Carroll, C. A., Pa.*, 1950, 184 F. 2d 153, certiorari denied, 71 S. Ct. 490, 340 US 929, 95 L ed. 670), it would follow that the definition of radio station would also include a television station.

Inasmuch as there is no provision of Florida Statutes which undertakes to define what is a "radio station licensed by the federal communications system," it would appear that we must, necessarily, look to the federal communications act for the meaning of that phrase.

In view of the above, your question is answered in the affirmative.

060-32—February 18, 1960

### CRIMINAL PROCEDURE

#### SERVICE OF PROCESS, FEES OF COUNTY OFFICERS

To: *Clyde Mayhall, County Attorney, Marianna*

#### QUESTION:

Is there authority to send a warrant of a justice of the peace court to another county, have the sheriff arrest the prisoner and hold him for return by the constable and guard from the county of issuance?



I direct your attention to A. G. O. 047-403, rendered by my predecessor in office, which relies upon the case of *Leon County v. Gray*, 96 Fla. 476, 118 So. 305, which was affirmed in *Taylor v. State ex rel. Coleman*, 151 Fla. 322, 9 So. 2d 417.

It would appear from these cases and the above mentioned opinion that there is authority for the arrest by the sheriff of the second county and that the constable would be authorized mileage and fees for the pick up and return of the prisoner. The questions relating to the compensation of the guard would stem from the necessity of his employment and this is a question requiring the exercise of discretion by the constable. It would, however, appear on the surface that a guard might not be necessary to return a prisoner facing trial for a misdemeanor.

060-34—February 18, 1960

#### TAXATION

DOCUMENTARY STAMP TAXES—LEASES OF EQUIPMENT—  
OPTION TO PURCHASE—CH. 201; §§201.01, 201.08 AND  
215.26, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are lease agreements, executed by both the lessor and the lessee, of tangible personal property, including options to purchase in connection therewith, wherein the lessee obligates himself to pay certain rental payments, subject to documentary stamp taxes in this state?

We have examined the form of lease handed us with your request for opinion, from which we find that the lessor agrees to lease to the lessee certain equipment (tangible personal property), for the lessee's use, for a period of three years, for a stipulated amount, payable in installments, 50% of the stipulated amount being payable in 12 monthly payments during the first year, 30% likewise during the second year and 20% during the third year. These payments are to be to the lessor "at 324 East Dewey Avenue, Buchanan, Michigan." It is stipulated in §14 of the lease agreement that "the obligations of Lessee shall continue," notwithstanding permissive use of the property beyond the term of the lease, and that "the cancellation or other termination of this lease or the lease of any item of equipment hereunder shall not release Lessee from any obligations to Lessor hereunder."

The obligations of the lessee under the lease form examined by us seem to be such that the lessor may enforce them in court. The obligations of the lessee under the lease are those mentioned in §18 thereof. The same appear to be written obligations of the lessee to pay money within the purview of §201.08, F. S., if the lease contract in question is within the purview of said section.

We gather from a letter in the file (Jan. 25, 1960) that the usual procedure is for the lessor, or some person in his behalf, to solicit the prospective lessee for a lease of the equipment and, if the prospective lessee is interested, a check of his credit rating is made, and, if acceptable, a form of lease of the desired equipment is prepared and sent to the customer for execution. If acceptable to the prospective lessee, it is duly executed by him, and sent to the lessor for acceptance or rejection. If accepted, the document be-

comes a binding lease contract; as stated in said letter of Jan. 25, 1960, it becomes "a binding legally enforceable agreement." The situs of the contract, having been accepted in Michigan, would seem to be in Michigan; however, the obligations of the lessee thereon arose because of his execution of the contract in this state.

Under Ch. 201, F. S., there is levied a documentary stamp tax *on written obligations to pay money "made, executed, delivered, sold, transferred or assigned in this state. . . ."* This tax is "for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections (including §201.08) or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing or thing, or any of them, are written or printed by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state." (§201.01, F. S.).

The lease contract is made and signed in Florida, and delivered in due course to the lessor in another state, where it is accepted by the lessor and the equipment described therein is delivered to the lessee in this state. In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, the appellant made and executed a promissory note in Florida, for the purpose of obtaining a loan from the Columbia bank for cooperatives of Columbia, South Carolina, and mailed the said note to the said bank, at Columbia, South Carolina, where the note was received and accepted by the bank, and the loan made to the Florida association. A documentary stamp tax was paid on the note at the time of its making and execution; however, pursuant to §215.26, F. S., an application for a refund of this tax was made, on the ground that no tax was due on the said note. The refund was denied in this case. The supreme court of Florida, in this case remarked, that it "is true that the note was delivered to a bank in South Carolina, but it was made in Florida, the loan was used in Florida, and it was in all essential factors a Florida transaction." The court further remarked that "the Documentary stamp tax is an excise tax on the promise to pay. The terms and certainty of the payment are not material. We are convinced that the factors tending the note bring it within the class taxable under chapter 201, Florida Statutes (text 416)."

The instrument in question, together with a supplemental document in the file, labeled an "Option to Purchase," seems to bring the instrument within the purview of *Nelson v. Watson*, 114 Fla. 806, 155 So. 101, which involved a so-called lease of a rocking chair, but construed to be a conditional sale of the rocking chair. Under the instrument here considered, whether held a lease or a conditional sale, the so-called lessee has obligated himself to pay the sums therein mentioned on his part. The stamp tax imposed by §201.08, F. S., is not upon the instrument or contract itself, but upon the obligation to pay therein contained. We have here a written obligation to pay money on the part of the lessee.

The above stated question is, therefore, answered in the affirmative.

060-35—February 23, 1960

**CRIMINAL PROCEDURE**

**ESTREATURE OF BAIL BONDS—APPLICABILITY OF STATE STATUTES TO ALLEGED VIOLATORS OF ORDINANCES OF CITY OF MIAMI—CHS. 901-925; §§903.28-903.31, AND 906.26 AND 906.27, F. S.; CH. 59-192**

*To: Vivion B. Rutherford, Special Counsel, City of Miami*

**QUESTION:**

**Are the Florida Statutes concerning the estreature of bail bonds, and particularly Ch. 59-192, which was introduced as house bill 396, applicable to bail bonds posted by persons charged with violating the ordinances of the city of Miami?**

The said Ch. 59-192 amended §§903.29 and 903.31, F. S. Sections 906.26, 906.27, 903.28, and 903.30 also relate to bail bond estreatures.

I do not think that any of these statutes apply to bail bonds given by persons charged with violating the municipal ordinances of the city of Miami. In my opinion, the entire criminal procedure law, which consists of Chs. 901-925 and which includes the statutes mentioned above, relates only to arrests and prosecutions for violating state laws, except when apt words are used in a particular provision to indicate that it is to apply to arrests or prosecutions for violating municipal ordinances, and I find nothing in any of the above-mentioned statutes or in any other part of the said criminal procedure law to indicate that the legislature meant for said statutes to apply to the estreature of any bail bonds except those given in connection with prosecutions for violations of state laws.

Therefore, your question is answered in the negative.

060-36—February 24, 1960

**TAXATION**

**HOMESTEAD TAX EXEMPTION—RIGHTS OF REMAINDERMEN RESIDING ON LANDS—§7, ART. X, STATE CONST.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Are remaindermen, whose titles are subject to life estates, entitled to homestead tax exemption where they reside on such lands and make the same their permanent homes?**

From your file, handed us with the request for opinion, it appears that "A" and "B," husband and wife, conveyed certain real property owned by them, not within the limits of any incorporated city or town, to their five children, as tenants in common, to share and share alike as such tenants; subject, however, to a life estate measured by the life of "A," one of the grantors. Two or more of such grantees, and children of the grantors, reside on said lands and claim to make the same their permanent home, and have filed homestead tax exemption claims based thereon. We are not advised of any conveyance by the life tenants to the remaindermen sufficient to merge the two estates. "Every person who has the legal title or beneficial title in equity to real property in this State and resides thereon and in good faith makes the same his or her

permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed value of Five Thousand Dollars on the said home and contiguous real property . . . ." (§7, Art. X, State Const.)

*Nature of an estate in remainder.*—Blackstone's definition of an estate in remainder is concise and comprehensive. "An estate in remainder is an estate limited to take effect and be enjoyed after another estate is terminated." Another definition commonly given is "an estate limited to take effect in possession immediately after the expiration of a prior estate created by the same instrument." (4 Thompson on Real Property, Permanent Ed., 730, §2199). It is stated in 4 Thompson on Real Property, *supra*, that the essential characteristics of a remainder in real property are a precedent particular estate, on whose regular termination the remainder must wait, the remainder and particular estate must be created at the same time and by the same instrument, the remainder is vested during the particular estate, however, without the right of possession. "A remainder is a remnant of an estate in land, depending on a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of the prior estate" (31 C. J. S. 88, §68). "A life estate is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event" (31 C. J. S. 39, §30). Thompson states that a life estate has often been referred to as a particular estate to a remainder estate (4 Thompson on Real Property, Perm. Ed. 732, §2200). The remainderman is vested with an immediate title to the lands but his right to possession is deferred until the termination of the particular estate, in this case, the life estate. Although the title to the remainder vests when the deed of conveyance is made, executed and delivered, it is subject to the life estate which of itself is a freehold.

*Right of remainderman to possession.*—"A remainderman is defined as an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument" (Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378, text 382). We are here dealing with vested remainders which have been defined as those whereby a present interest passes to the remainderman and "the right of the estate in a vested remainder is fixed and certain though the right to possession is deferred. Where there is a vested remainder, the interest of the remainderman arises to the dignity of an estate in the land, and the possession of the tenant of the particular estate is construed to be the possession of him in remainder, so that the remainderman is held to be seized of his remainder. It is an estate in praesenti, although to be enjoyed in the future. The actual or constructive possession is in the particular tenant until the happening of the contingency upon which his estate is to end; so the possession and enjoyment by the remainderman is postponed until the particular estate is determined" (4 Thompson on Real Property, Perm. Ed., 745-746, §2210). "As long as his estate therein continues, the life tenant is entitled to the possession and enjoyment to the exclusion of the remaindermen or reversioners and those claiming through or under them" (31 C. J. S. 46, §38). "A remainderman is not entitled to possession of the property until the termination of the preceding particular estate," that is the life estate (31 C. J. S. 97, §85). "The



principle is well settled that a life tenant who is the holder of a present estate for life in real property is entitled to the possession and use of the property . . . . During an ordinary life tenancy in realty, the remainderman does not have the right of possession or use" (33 Am. Jur. 703, §219). It is, therefore, apparent that the life tenant, and not the remaindermen, is entitled to the possession and use of the lands conveyed. The remaindermen, if in possession, must be under the life estate and not under their estate in remainder. If in possession under the authority or knowledge of the life tenant, they are in possession as tenants of the life estate.

*Homestead rights in remainders.*—"The general rule is that a future estate, whether vested or contingent, will not support a claim of homestead exemption during the continuance of the prior estate" (40 C. J. S. 522, §82). "Since land held in remainder is not susceptible of that immediate occupancy which is contemplated by the law in order to support a claim of homestead, such a claim may not be successfully asserted by the remainderman. The rule applies where the remainderman occupies the premises during the life of the life tenant by the latter's permission." (26 Am. Jur. 38, §61). Where lands were devised to a widow for life, remainder to the testator's children, were occupied by both the widow and a remainderman, the tenant in remainder was held not entitled to a homestead exemption on his interest during such continuance of the life estate (Roach v. Dance, 26 Ky. L. 157, 80 S. W. 1097). "A claim of homestead exemption must be supported by some possessory in the land; there must be at least a present right of possession or occupancy . . ." (40 C. J. S. 520, §80).

Remaindermen, whose titles are subject to life estates, are not entitled to homestead tax exemption to such lands, where their possession is claimed under their title in remainder, although they reside on such lands and make the same their permanent homes, etc.

This opinion does not consider cases where the remainderman is in possession under conveyance from the life tenant or other written right, as no such conveyance or other written right from the life tenant appears from the file; neither does it consider the homestead rights of the life tenant notwithstanding the remainder estates.

060-37—February 24, 1960

**CORPORATIONS AND BUSINESS TRUSTS**  
**NONPROFIT COOPERATIVE HOUSING CORPORATIONS—**  
**REGISTRATION—CH. 617 AND §§617.01 AND 617.11(1),**  
**(2), F. S.**

To: R. A. Gray, Secretary of State, Tallahassee

**QUESTION:**

May a corporation, organized for the purpose of securing certain financing provisions under the federal housing authority program, and whose members will receive no pecuniary profit from the corporation, be registered under the provisions of Ch. 617, F. S.?

The certificate of incorporation of Coral City Mutual Homes 35, Inc., submitted with your request, has been carefully examined by my office. It appears that this corporation is organized solely for the purpose of permitting its members to take advantage of a cooperative housing construction program available under title 12,

U. S. C. A., §1715e, which provides as follows:

(a) In addition to mortgages insured under section 1713 of this title, the Commissioner is authorized to insure mortgages as defined in section 1713(a) of this title (including advances on such mortgages during construction), which cover property held by—

(1) a *nonprofit cooperative ownership housing corporation* or nonprofit cooperative ownership housing trust, the permanent occupancy of the dwellings of which is restricted to members of such corporation or to beneficiaries of such trust;

(2) a *nonprofit corporation* or nonprofit trust organized for the purpose of construction of homes for members of the corporation or for beneficiaries of the trust; . . . (Emphasis supplied.)

The above articles of incorporation fail to reveal any provision for the corporation to be operated for profit or for the membership thereof to receive any pecuniary benefits. It does not have stock certificates indicating what is commonly understood to be a share in the ownership of a corporate entity. It does, however, have membership certificates which appear to have the legal effect of permitting the owner thereof to purchase a completed dwelling.

A mutual stock corporation formed to furnish water to stockholders at cost was a "nonprofit corporation" in the sense that there could be no distribution of profits to shareholders prior to dissolution (*Pritchard v. Crestline Village Mut. Service Co.*, 212 P. 2d 526, 528, 95 Cal. App. 2d 151).

Corporations not for profit may be organized without any capital stock even though such corporations are neither religious, charitable, social, literary, educational, or eelymosynary in nature, the test in each case being *whether they are, as a matter of fact, conducted for profits*, that is, whether dividends are expected to be paid or whether the purpose of particular corporations is to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends (*Read v. Tidewater Coal Exch.* (1922) 13 Del. Ch. 195, 116 A. 898. See *State ex rel Russell v. Sweeney*, (1950) 153 Ohio St. 66, 91 N.E. 2d 13, 16 A. L. R. 2d 1337).

The corporation discussed in the Russell case, *supra*, was by the majority opinion denied nonprofit status because said corporation was authorized to take over the assets and liabilities of another corporation for profit. The majority opinion held this permissive authorization to be sufficient to deny nonprofit corporate status.

Section 617.01, F. S., 1957, provided in part as follows:

Any five or more persons, wishing to form a religious society, lodge of masons, or any other similar order, debating or literary society, library company, benevolent, or charitable association, scientific institution of learning, or cemetery company, may become incorporated in the following manner: . . .

The 1959 legislature amended §617.01, F. S., 1957, to provide as follows:

(1) Corporations may be organized and incorporated under this chapter for any one or more lawful purposes not for pecuniary profit; provided, however, that corpora-

tions not for profit which may be incorporated under any other law of this state governing particular types of corporations may not be incorporated hereunder.

(2) As used in this chapter "corporation not for profit" means a corporation no part of the income of which is distributable to its members, directors or officers.

Apparently the 1959 legislature considered the express classification of nonprofit corporate purposes appearing in the statute prior to amendment as being too limited to permit all corporations not for profit and not authorized to register under other laws of this state from attaining corporate status. It appears that the legislature by the 1959 amendment intended to authorize corporate status for corporations such as the one whose certificate of incorporation is herein considered.

We are advised that other states having nonprofit corporation statutes similar to Ch. 617, F. S., are permitting the formation of nonprofit corporations for the purpose of taking advantage of the FHA financing program authorized by title 12 U. S. C. A., §1715e.

It is evident from the certificate of incorporation before us that the contemplated nonprofit entity is not authorized to engage in any other business than the construction and operation of a housing project on a nonprofit basis. In view of the fact that the corporation is to have perpetual existence, I point out that a situation may occur in the future where owners and members of such corporations may desire to use the corporate entity for their own pecuniary benefit. Although corporations of this nature are intended to take advantage of certain FHA financing programs, once such programs are completed and the mortgages in connection therewith have been satisfied, the corporation remains in existence, its members then being comprised solely of the homeowners who have availed themselves of FHA financing programs by these means. It is conceivable that such groups may attempt to utilize the corporate entity for purposes other than those for which it was intended; e.g., large purchases and resale of consumer goods in connection with the operation of the housing co-op, communal improvement programs such as beautification of streets surrounding their homes, etc. Such activities by corporations of this nature would constitute a violation of the laws relating to nonprofit corporations and would result in petitions for corporate dissolution being filed, the institution of quo warranto proceedings by the attorney general or criminal prosecution of the corporate members under applicable criminal laws.

Briefly stated, it is not contemplated that the nonprofit corporation will have any earnings. Instead its total fund will be moneys borrowed which are insured by FHA, the same to be allotted for the construction of individual houses for its membership and for no others, all pursuant to the strict controls of FHA. In other words, its function will be to secure and process the loans from FHA with no earnings or profits to the corporation in this operation.

It is with great circumspection that my approval of the registration of corporations such as herein considered under the provisions of Ch. 617, F. S., 1959, is given. We do not herein question the wisdom of the legislature in its 1959 amendments to said chapter. The broad language which it has selected, and

the cases cited herein dealing with similar statutes, appear to authorize such registration.

As to foreign nonprofit corporations organized in other jurisdictions for similar objects having purposes not prohibited or contrary to the laws of this state, they may, under the provisions of §617.11(1), (2), F. S., 1959, now be authorized to conduct their affairs in this state after filing the appropriate instruments and fees with the secretary of state. The modifications of the nonprofit corporation law enacted by the 1959 Florida legislature discussed herein makes necessary the announcement that so much of A. G. O. 055-214 as is in conflict herewith is superseded and rescinded.

While the secretary of state is by law clothed with the administrative discretion in granting or denying corporate charters filed with that officer, it is, in an effort to be of some assistance in making future determinations which will arise under this new law, suggested that the test set out above in this opinion be applied in each instance. The test to be applied in determining whether a corporation should be formed as nonprofit under the provisions of Ch. 617, F. S., is whether the corporation may conduct its affairs in such manner as to return dividends to the members or by any other direct or indirect means produce profits or income to the corporate members. If this test is applied in each instance there should be little difficulty in administering Ch. 617, F. S., as amended by the 1959 legislature.

Your question as set out above is answered in the affirmative.

060-38—February 24, 1960

#### TAXATION

#### INTANGIBLE PERSONAL PROPERTY TAXES—JOINT ADVENTURES, INTERESTS OF—CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Is the intangible personal property of a joint adventure subject to intangible personal property taxes under Ch. 199, F. S.?

"Numerous terms have been used to describe the legal relationship resulting from an agreement between two or more persons to engage in an enterprise of limited scope and duration. 'Joint adventurers,' 'syndicate' and 'co-adventurer' are words that have been used to describe the relationship. 'Joint adventure' as a legal concept is of fairly modern origin and is purely a creature of the American courts . . . Joint adventure is best defined as a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation. It is further defined as an association of persons or legal entities to carry out a single business enterprise for profit. Thus it is a limited partnership, not in a statutory sense as to liability, but as to its scope and duration." (18 Fla. Jur. 430-431, §2; see also *Kislak v. Kreedian*, Fla., 95 So. 2d 510, text 514 and 515; *Donahue v. Davis*, Fla., 68 So. 2d 163, text 171; annotations in 48 A. L. R. 1055, 63 A. L. R. 909, 80 A. L. R. 857 and 138 A. L. R. 968). It has been said that the only distinction between a joint adventure and a partnership is the limited and specific objects in view (*Donahue v. Davis*, supra).



"A joint adventure must also be distinguished from a partnership. Though similar and governed by the same rules of law, joint adventure and partnership are separate legal relationships." (18 Fla. Jur. 432, §3). "The relationship of joint adventure contemplates both a right to share in any profits and a duty to share in any losses that may be sustained. A mere sharing of profits alone does not give rise to a joint adventure." (18 Fla. Jur. 438-439, §8). "A contract of joint adventure is in effect one of Mutual agency, each adventurer acting as a principal in his own behalf and as agent for his coadventurers" (18 Fla. Jur. 444, §12). Joint adventure is to be distinguished from joint ownership; thus the mere purchase of property by several persons, each contributing a portion of the purchase price, makes them co-tenants and not joint adventurers (30 Am. Jur. 942, §5). "A conveyance of the interest of one or more of the members of a joint adventure or syndicate to a third person does not of itself terminate the joint enterprise" (30 Am. Jur. 960-961, §32) as does the conveyance of a partnership interest (40 Am. Jur. 299, §243). Property of a joint adventure belongs to all the coadventurers unless it be otherwise provided in the articles of joint adventure (30 Am. Jur. 965-966, §38). This seems to include personal property. "The personal property of a partnership is owned not by the partners individually, but by the partnership" (40 Am. Jur. 202, §107; 24 Fla. Jur. 356, §55). "Joint adventurers take title to real property purchased by them as tenants in common and not as partners" (48 C. J. S. 834, §7). *Campbell v. Jacksonville Kennel Club, Fla., 66 So. 2d 495*, involved a race track ticket purchased jointly by two persons, which was a winning ticket. The court held the transaction to be a joint adventure, with the joint adventurers having a community of interest in the ticket and mutual control over it; the court treated the ticket as being, not the property of the joint adventure as an entity, but of the joint adventurers.

From the file handed us with the request for opinion it appears that during October, 1959, the General Capital Corp. entered into an agreement with the City Industrial Co., evidently a New York corporation, and maybe others, under which agreement said parties agreed to furnish financial aid to an aluminum products company in a substantial amount. Similar financial aid may have been furnished other persons, firms or corporations, by other joint adventurers, of which the General Capital Corp., was an adventurer. In the participation agreement before us it appears that the City Industrial Co. furnished 50% of the funds loaned to the Aluminum Products Co., with the Industrial Co. to "have an undivided interest to the extent of your participation in all our rights, claims or collateral and guaranties" acquired by reason of the transaction. The General Capital Corp. was to share in the losses, as well as the gains. *The adventurers are possessed of the loan obligation of the Industrial Co. as tenants in common*, not the adventure as an entity. Usually intangible personal property has its situs at the residence of its owner; unless such property has acquired a business situs elsewhere.

The intangible personal property of a joint adventure, being vested in the adventurer, not in the adventure as an entity, is subject to taxation under Ch. 199, F. S., if it has a tax situs in this state, otherwise not. In the specific case before us the intan-

gible personal property subject to Florida taxation consists of those shares or percentages of the loan obligations in the form of notes, mortgages, warehouse receipts or other evidence of indebtedness which are owned by the joint adventurers residing in Florida and whose ownerships are evidenced by the participation agreements. If we were to hold otherwise, those ascertainable interests of Florida residents in said intangibles would go untaxed. Any such interests of persons, firms, and corporations residing or having a principal place of business in this state, would be subject to taxation in the county of their residence or where their place of business may be.

060-39—February 25, 1960

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
BALLOON MORTGAGES—CONSTRUCTION OF §697.05, F. S.,  
(CH. 59-356)**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTIONS:**

1. What are deemed balloon mortgages within the purview of §697.05, F. S.?
2. Are first mortgages, without regard to their maturity, exempt from the provisions of §697.05, F. S.?
3. May mortgages securing demand notes be classified as balloon mortgages within the purview of §697.05, F. S.?

**AS TO QUESTION 1:**

Under §697.05(2), F. S., "every mortgage in which the final payment or the balance due and payable upon maturity is greater than *twice the amount of the regular monthly or periodic payment* of the said mortgage shall be deemed a balloon mortgage." Doubtless the basis for this legislation was the protection of those making mortgages encumbering their property and to protect them from mistake and error, and to prevent them thinking that their mortgages were paid off or about paid off when such is not the case. It was designed to prevent fraud and deceit, either directly or indirectly. It doubtless was enacted under the police powers of the state. This theory of the act is borne out by the legend required to be placed at the top of the first page or front sheet, also immediately above the signatures of the makers. The statute should be construed in favor of the mortgagor and against the mortgagee. Briefly, a balloon mortgage, within the purview of the statute, is any mortgage, within its purview, where the final payment of the balance due upon its maturity is more than twice the regular periodic payments.

The phrase "regular monthly or periodic payment," as used in the statute refers to the regular payments to be made on regular dates, whether the same be monthly, or some other regular periodic payment. Weekly, monthly, quarterly, or other periodic payment is within the statute.

**AS TO QUESTION 2:**

This question involves the construction of the proviso in §5, Ch. 59-356, (§697.05(5), F. S.), which section, including the proviso, is as follows: "This act does not apply to any mortgage in effect prior to the effective date of this act; *provided, however, that all*

*first mortgages and all other mortgages* created for a term of more than five years are exempt from the provisions of this act." In *Farrey v. Bettendorf, Fla.*, 96 So. 2d 889, text 893, the court said that "the office of a proviso in a statute is not to enlarge or extend the act of which it is a part, but rather to be a limitation or a restraint upon the language which the legislature has employed," the presumption being that "it refers only to the provisions to which attached" (*U. S. v. Morrow*, 266 U. S. 531, 45 S. Ct. 173, 69 L. ed. 425, text 427; *U. S. v. McClure*, 305 U. S. 472, 59 S. Ct. 335, 83 L. ed. 297, text 297); however, when necessary to effectuate the legislative intent, a proviso may be construed as applying to other paragraphs and sections (82 C. J. S. 887-888, §381) or to introduce independent legislation (*U. S. v. Morrow*, *supra*). When that portion of subsection (5) before the proviso is considered with the proviso, it appears that the portion before the proviso relates to mortgages made, executed and delivered prior to the effective date of the act and the proviso to mortgages made, executed and delivered after the effective date of the act. The proviso seems to add additional exemptions to the exemption provided by the first part of the said section.

We next come to the question of whether all first mortgages, without regard to maturity, are exempt from the statute, or whether only those maturing in more than five years are exempt. The proviso seems subject to two constructions. The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature (50 Am. Jur. 200-202, §223; 82 C. J. S. 560, et seq., §321; and Florida authorities cited). The act in question, when read as a whole, appears to consider balloon notes and other written obligations, and the mortgages securing them, to be of such nature as to justify state regulation and control, for the protection of the general public.

*Ison Finance Co. v. Glasgow, Ala.*, 96 So. 2d 737, involved a balloon note, payable at the rate of \$75 per month, with a last payment of \$1,005.10, concerning which there appears to have been an oral promise to extend with payments at the rate of \$75 per month; which oral promise was held by the court to be within the written evidence rule and unenforceable, the result being the loss of the mortgaged property by the mortgagor, he being unable to pay the full amount of the indebtedness then due. The purpose of the statute was evidently to protect the public from situations as were involved in the Alabama case, as well as to prevent possible fraud on members of the public having little or no business experience. Did the legislature intend to give no protection to first mortgagors, without regard to maturities, and give protection to second and subsequent mortgagors where their mortgages mature in five years or less? Are first mortgagors entitled to no protection under the act, while second and subsequent mortgagors receive protection? If the word "and" in the proviso is construed as conjunctive, then both first and subsequent mortgagors receive the protection of the act, but if read as disjunctive, first mortgagors receive no protection from the act. This might lead to a serious question of equal protection of the law as between first mortgages and second and subsequent mortgages in the hands of their mortgagees, and in the protection of first mortgagors and second and subsequent mortgagors. In view of the purpose to be

served by the act we are unable to perceive a reasonable basis for wholly exempting first mortgages. A statute should not be so construed as to make it violative of the state or federal constitution.

AS TO QUESTION 3:

A demand note, strictly speaking, would not appear to be within the statute, as there would be no final payment "greater than twice the amount of the regular monthly or periodic payment," and, therefore, not within the purview of the statute, so long as it remains unchanged. The contract would not be one in which "the final payment or the balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payments." Such a note in law is due immediately, so that suit may be maintained thereon at any time after delivery (10 C. J. S. 744, §247). However, should the demand obligation secured by a mortgage be changed, by agreement of the parties, so that, instead of being due upon demand, the obligation is payable in installments, if "the final payment or the balance due and payable upon maturity (under the modification) is greater than twice the amount of the regular monthly or periodic payments," the mortgage, upon such a modification, would probably become a "balloon mortgage" within the purview of §697.05, F. S. We doubt that the parties may, by such a modification of the maturity of an obligation secured by a mortgage, evade said §697.05, F. S. It is within the right of the parties to such an obligation to change the time for payment by their agreement (10 C. J. S. 758, et seq., §§263, et seq.). "It has been held that the time for payment of a debt secured by a mortgage may be extended by a valid agreement between the parties if third persons are not injured." (59 C. J. S. 695, §447).

"It is a fundamental principle of law that a person will not be permitted to do indirectly what he is not permitted to do directly" (Clermont-Minneola Country Club v. Loblaw, 106 Fla. 122, 143 So. 129, text 133; Bauman v. Healy, 141 Fla. 478, 193 So. 773, text 779). We therefore doubt that the application of §697.05, F. S., may be avoided by the making of a demand note, securing it with a mortgage on real or personal property, and then by agreement of the parties change the plan of payment so that the indebtedness is payable in installments within the purview of said §697.05.

It is recognized that §697.05, F. S., is subject to statutory construction and that lawyers may differ as to its construction; however, we feel that when the usual rules of construction are applied, in the light of the intention and purpose of said §697.05, the above stated questions should be answered as follows:

1. A mortgage is deemed a balloon mortgage, under §697.05, F. S., when the final payment or the balance due and payable upon maturity, in accordance with the loan agreement, is greater than twice the amount of the regular monthly or periodic payments. Such an obligation may be payable in weekly, monthly, quarterly, yearly, or other periodic installment payments.

2. The phrase "all first mortgages and all other mortgages created for a term of more than five years are exempt from the provisions," when read in the light of the legislative purpose of the section, exempts only those mortgages maturing *more than five years* from their execution and delivery, and is not intended to



exempt all first mortgages regardless of maturity. (Emphasis supplied.)

3. Although mortgages securing demand notes, or other obligations are not within the statute, there being no "final payment or balance due and payable upon maturity . . . greater than twice the amount of the regular monthly or periodic payment," they may be brought within the statute by subsequent agreement between the parties if the final payment or balance due and payable upon maturity, under the subsequent agreement, is greater than twice the amount of the regular monthly or periodic payments, under subsequent agreement. Although lawyers may differ as to our answer to question 3, we feel that until the statute is construed by our courts, the only safe rule to follow is that a subsequent agreement may bring a mortgage and the indebtedness secured by it within the statute, although not originally within such statute.

060-40—February 25, 1960

#### INSURANCE

GROUP LIFE, HEALTH AND ACCIDENT INSURANCE, CONTRACTS FOR PINELLAS COUNTY BOARD OF PUBLIC INSTRUCTION—CH. 57-1732; §§112.08 AND 230.04-230.21, F. S.

To: Edward A. Turville, Attorney, Board of Public Instruction, St. Petersburg

#### QUESTION:

Does Ch. 57-1732, which authorizes Pinellas county, through its boards and officers to enter into contracts for group life, health or accident insurance policies for the employees of the county, apply to the county board of public instruction?

Chapter 57-1732 provides:

Section 1. The board of county commissioners of Pinellas county, Florida, hereinafter called the county, *the officers or other boards of such county*, may enter into agreements with insurance companies or agencies to provide group life, health, or accident insurance for the benefit of their employees.

Section 2. When such agreements referred to in Section 1 provide that the county or the officers thereof shall pay a part of the premium for such insurance, the county or the officers thereof are hereby authorized to pay the county's contribution of such premiums from such revenues of the county or fees which would ordinarily be available for salaries of such employees.

In the case of *First National Bank v. Board of Public Instr., Fla.*, 111 So. 523, the court characterized a county school board as "a county instrumentality, a corporation organized to conduct certain affairs in that particular county and occupies the status of a trustee for the purposes for which it is created as to county property and county funds." While the present school code was enacted subsequent to said judicial pronouncement, a reading of the school code, particularly §§230.04-230.21, F. S., will evidence that the characterization remains unchanged. A county school board is a corporate "juristic entity;" it is an instrumentality of the county separate and distinct in its functions from the recognized func-

tions of the county; and its employees are not employees of the county.

It would appear, however, from the language used in Ch. 57-1732 that the Florida legislature intended to extend its provisions not only to employees working under the board of county commissioners but to employees of all "other boards of such county."

The county board of public instruction as defined by the Florida supreme court is "a county instrumentality" and as such would appear to fall within the broad definition of "other boards of such county" used in Ch. 57-1732.

It is my opinion, therefore, that in Pinellas county the special act (Ch. 57-1732) of the legislature must govern rather than the general law set forth in §112.08, F. S., which permits county school boards to enter into group insurance contracts for their employees but does not permit payment of premiums from public funds.

Your question is therefore answered in the affirmative.

060-41—March 2, 1960

**COUNTY BOARD OF PUBLIC INSTRUCTION  
CONSTRUCTION CONTRACTS—REQUIREMENTS FOR  
PENALTY PROVISION—§235.32, F. S.**

To: *Thomas D. Bailey, Superintendent of Public Instruction,  
Tallahassee*

**QUESTION:**

**Is a county board of public instruction required by Florida law to include a liquidated damage clause in all construction contracts?**

Section 235.32, F. S., provides, in part:

Upon accepting a satisfactory bid, the county board shall enter into a contract with the party or parties whose bid has been accepted and such contract shall contain the drawings and specifications of the work to be done or the material to be furnished, the time limit in which the construction is to be completed, the time and method by which payments are to be made upon said contract and the penalty to be paid by the contractor for the failure to comply with the terms of said contract. . . .

From the foregoing, it is clear that the statute imposes a requirement for a penalty provision in school construction contracts for the express purpose of obtaining full compliance with the terms of the contract. In this regard, it should be noted that the purpose for and the nature of a penalty clause is extremely important. If the penalty clause is arbitrary and capricious, with no relationship to the actual damages suffered, it may be held void if challenged in a court. However, if the so-called penalty provision is in fact a liquidated damage provision bearing a direct and reasonable relationship to the actual damages incurred by failure of the contractor to comply with the terms of the contract, it is generally upheld.

With these comments in mind, it appears that the statute contemplates the penalty clause in all construction contracts of the county board; however, caution should be exercised to insure the reasonableness of the penalty provisions consistent with the views expressed herein.

Accordingly, your specific question must be answered in the affirmative.

060-42—March 2, 1960

### SHERIFFS

OFFICE BUDGETS — PROCEDURE — ENFORCEMENT BY  
SHERIFFS — CONSTRUCTION OF §§30.48-30.50, F. S., 1957  
AND 1959 — §§193.03 AND 193.31, F. S.

To: Ray Wilson, Sheriff, Okaloosa County, Crestview

#### QUESTIONS:

1. When did the sheriffs' office budgets become final and binding on the sheriffs and the boards of county commissioners under §§30.48, et seq., F. S., 1957?

2. When do the sheriffs' office budgets become final and binding on the sheriffs and the boards of county commissioners under §§30.48, et seq., F. S., 1959?

3. What is a sheriff's remedy where the board of county commissioners fails or refuses to comply with the sheriff's budget, duly adopted in conformity with §§30.48, et seq., F. S., 1957 or 1959?

Under §30.49, F. S., both 1957 and 1959, "at the time fixed by law for the preparation of the county budget, each sheriff shall certify to the board of county commissioners a proposed budget of expenditures for the carrying out of the powers, duties and operations of his office for the ensuing fiscal year of the county." The county year begins on October 1 and ends the following September 30. The form of the sheriff's budget should follow substantially the requirements of said §30.49 (2). The time fixed for the preparation of the county budget is controlled substantially by §§193.03 and 193.31, F. S.; that is, when the equalization of valuations has become final and the total assessed value of the taxable properties has been ascertained and finally fixed. This is usually in July, but sometimes in August. The tax millage rate is measured by the financial needs of the county and the overall value of the taxable properties. It is imperative that the board of county commissioners has the sheriff's office budget to enable such board to ascertain the financial needs of the county and fix the millage rate of the county.

Under the provisions of said §30.48, et seq., F. S., 1957 the board of county commissioners (which term shall include county budget boards where such boards exist) "may not reduce any proposed expenditure without the consent of the sheriff unless within sixty days after receipt of said proposed budget it first obtain the approval of such reduction in the proposed expenditure by a majority vote of" the board of county officers' budget appeals (governor, comptroller, and attorney general). The budget submitted by the sheriff became final upon delivery to the board of county commissioners unless changed with the approval of the sheriff or an appeal was taken by said board "within sixty days after receipt of said proposed budget" of the sheriff's office. In other words the sheriff's budget became final unless changed with the consent of the sheriff or appealed, within 60 days after receipt, by the board of county commissioners. If appealed, the budget

became final upon the final disposal thereof by the board of county officers' budget appeals.

Under the provisions of §§30.48, et seq., F. S., 1959, the board of county commissioners, upon receipt of the sheriff's office budget, may amend, modify, increase or reduce the said office budget and the items therein; however, written notice of any such amendments, modifications, increases or reductions must be given by the board to the sheriff. Such action on the part of the board of county commissioners is required to be taken "no later than August first" of the tax year. This seems to be a limitation and doubt exists as to the jurisdiction of the board of county commissioners to act on the said sheriff's office budget after August 1 without the consent of the sheriff. The sheriff's office budget, as approved by the board of county commissioners, with or without change, becomes final unless "the sheriff, within ten days after receiving written notice of such action by the board" files an appeal to the board of appeals of county officer's budgets. The difference between the procedure under the Florida Statutes, 1957, and the Florida Statutes, 1959, was the result of the amendment of §30.49(3), by Ch. 59-216, which act, by its terms, took effect on October 1, 1959. The first sheriff's office budgets coming within the purview of the statute as amended will be those budgets to be submitted in 1960; the budgets submitted in 1959 were governed by the Florida Statutes, 1957.

We come next to the question of the enforcement of the sheriff's office budgets, although final, where the boards of county commissioners refuse or neglect to conform thereto and refuse or fail to conform to the statute in making payments to the sheriffs. Under §30.50, F. S., there being no change in this section between the Florida Statutes, 1957, and Florida Statutes, 1959, "the sheriff shall requisition, and the board of county commissioners shall pay him, at the first meeting in October of each year, and each month thereafter, one-twelfth of the total amount budgeted for the office; provided, that at the first meeting in January of each year, the board shall, at the request of the sheriff, pay one-sixth of the total appropriated, and one-twelfth each month thereafter, which payments shall not be more than the total appropriation . . . ." Under these provisions the board of county commissioners has a ministerial duty to make the aforesaid payments to the sheriff for the efficient operation of his office. These moneys constitute a trust fund for the operation of the sheriff's office, but may not exceed the amount budgeted. Under said §30.50, it is made the official duty of the board of county commissioners to pay the funds aforesaid, upon the requisition of the sheriff, to the said sheriff in his official capacity.

A writ of mandamus is the proper remedy to compel a public officer or officers to perform his or her official duty (*State v. Daytona Beach*, 119 Fla. 381, 161 So. 870; *State v. Doss*, 141 Fla. 233, 192 So. 870; *State v. Miami*, 156 Fla. 784, 24 So. 2d 705; *Coral Gables v. State, Fla.*, 44 So. 2d 298). The payment of the appropriation to the sheriff, for the operation of his office, is not a matter of discretion, but a ministerial act, which may be enforced by mandamus (*State v. Haskell*, 72 Fla. 176, 72 So. 651; *State v. Board of County Commissioners*, 160 Fla. 900, 37 So. 2d 252; *Coral Gables v. State*, *supra*). "Mandamus is an appropriate remedy to compel



public functionaries or bodies to perform the duties imposed on them by virtue of their office," including boards of county commissioners (21 Fla. Jur. 355-357, §47). We therefore hold that the sheriff's remedy, where he has requisitioned funds for the operation of his office, pursuant to §30.50, F. S., and the board of county commissioners has failed or refused to comply with such requisition, is by an action in mandamus to require the said board of county commissioners to make the delinquent payments.

From the above and foregoing, the questions stated are answered as follows:

1. Under §30.48, et seq., F. S., 1957, the sheriff's office budget, became final upon approval, without change, by the board of county commissioners; or upon approval, although changed, with the consent of the sheriff; or 60 days after filing, in case no appeal was taken; or if an appeal was taken when approved, with or without change, by the board of appeals of county officers' budgets.

2. Under §30.48, et seq., F. S., 1959, when approved, with or without change, by the board of county commissioners; in case of an appeal when approved, with or without change, by the board of appeals of county officers' budgets; where no action is taken by the board of county commissioners prior to August 1 of the tax year, the budget probably stands approved unless some action is taken thereon by the county board.

3. Where the board of county commissioners fails or refuses to comply with the sheriff's budget and makes payments thereon as required by §30.50, F. S., pursuant to requisitions of the sheriff, the sheriff's remedy would seem to be by mandamus.

060-43—March 8, 1960

#### TAXATION

#### CONSTRUCTION OF §195.16, F. S., GROSS RECEIPTS TAXES AGAINST SLEEPING AND PARLOR CAR COMPANIES

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Does the phrase "gross receipts" as used in §195.16, F. S., extend to and include payments made by a railroad company to the Pullman company, under a guarantee?

Under said §195.16, F. S., "all sleeping and parlor car companies operating their cars in this state shall annually on or before the first day of January, report to the comptroller of the state . . . the total amount of their *gross receipts* derived from business done between points in this state" and pay the tax thereon as provided in said section. The tax is based on the *gross receipts on business done between points in this state*.

Statutes imposing license and excise taxes are strictly construed in favor of the taxpayer and against the taxing authority (Lee v. Gaddy, 133 Fla. 749, 183 So. 4, text 6; State v. Nelson, 155 Fla. 399, 20 So. 2d 394, text 395; Milliner v. State, Fla., 61 So. 2d 377, text 378; 53 C. J. S. 495, §13). Section 195.16, F. S., being in the nature of a license or excise tax, should be strictly construed, against the state and in favor of the taxpayer.

The tax is imposed on *gross receipts* on business done *between points* in this state. It is not imposed upon other income of the Pullman Co.,—only against its gross receipts on business between points

in the state. The payment under the guarantee was not a "gross receipts derived from business done between points." (See *New York v. 34th St. Crosstown Railway Co.*, 137 App. Div. 644, 122 N. Y. S. 344; *Commonwealth v. New York, Lake Erie and Western Railroad Co.*, 145 Pa. 200, 22 A. 806; *Islip v. Smith*, 3 A. D. 2d 726, 159 N. Y. S. 2d 763).

The above stated question is, therefore, answered in the negative.

060-44—March 8, 1960

## COURTS

FEE OF CLERKS OF CIRCUIT AND COUNTY COURTS IN APPELLATE PROCEEDINGS—§§25.371, 28.241(3), 34.04, 34.05(3), 34.041, 35.22(3), 932.52, §§3 AND §6, ART. V, STATE CONST.

To: D. T. Farabee, Clerk Circuit Court, Lee County, Fort Myers  
QUESTIONS:

1. What is the fee of the clerk of the circuit court in connection with appeals taken to said court from the county court or a municipal court?

2. What is the fee of the clerk of the county court in connection with appeals to the circuit court?

3. What is the fee of the clerk of the county court in connection with appeals taken to said court from justice of the peace courts?

Section 28.241(3), F. S., provides a fee of \$3.50 to be charged and collected by the clerk upon the institution of any appellate proceedings from any inferior court to the circuit court, or from the circuit court to the supreme court of the state. Unless otherwise provided, the clerk of the county court receives the same compensation for similar services as the clerk of the circuit court (§34.04, F. S.).

Under the provisions of §34.05(3), the clerk of the county court in counties having a population of more than 150,000 inhabitants shall have as fees the same compensation as the clerk of the circuit court for similar services. However, in *all counties* §34.041(2), F. S., provides a fee of \$3.50 to be charged and collected by the clerk upon the institution of any appellate proceedings from any inferior court to the county court or from the county court to the circuit court. However, §34.041 does not apply to counties having a population of more than 300,000 but less than 310,000 (§34.041(5), F. S.).

Section 34.041, F. S., was enacted by the legislature as Ch. 26931, 1951. Section 34.05, F. S., was enacted by the legislature as Ch. 16873, 1935. Thus as to any conflict between these two sections, §34.041, being the latest expression of the legislature, would control (*Johnson v. State*, 27 So. 2d 276, 157 Fla. 685; certiorari denied, 67 S. Ct. 491, 329 U. S. 799, 91 L. Ed. 683).

Hence, in all counties except those counties having a population of 300,000 to 310,000 inhabitants, the fee of the clerk of the county court in connection with appeals taken to the circuit court is \$3.50. In counties having 150,000 or more inhabitants, the clerk would receive the same fee as the clerk of the circuit court for perform-

ing similar services, viz., the receiving and filing of notices of appeal, which would be \$3.50. In those counties having a population of 300,000 or more but less than 310,000, the fee of the clerk of the county court would be the same as the fee of the clerk of the circuit court, viz., \$3.50.

Section 6, Art. V, State Const., as amended at the general election, Nov. 6, 1956, in pronouncing the jurisdiction of the circuit courts, provides that said courts shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace.

Section 932.52, F. S., deals with procedures in connection with appeals from municipal courts to the circuit court and subsection (15) thereof provides that the rules of the supreme court shall be applicable to such appeals excepting so far as they may be in conflict with said section.

In addition to the inherent power of the supreme court to promulgate rules governing the practice and procedure in all courts, the power to promulgate such rules is expressly conferred upon the supreme court by §3, Art. V, State Const., 26 F. S. A.

"When a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with the statute, the rule supersedes the statutory provision." (§25.371, F. S.)

Florida appellate rules, effective July 1, 1957, as amended, provide that all rules shall apply equally to the supreme court, the district courts of appeal and the circuit courts in the exercise of their appellate jurisdiction unless specifically limited to one court (Rule 1.1). From the effective date of such rules, as to proceedings commenced after June 30, 1957, said rules supersede all conflicting rules and statutes (Rule 1.4, 31 F. S. A.).

Rule 4.7 provides that "the Florida Appellate Rules shall govern procedure in the circuit courts in the exercise of their appellate jurisdiction . . . Filing fee for such an appeal or review shall be the same as the fee for filing a cause in the Circuit Court and shall be by check or money order payable to the Clerk of the Circuit Court." (Emphasis supplied.)

Florida appellate rule 3.2(a) dealing with commencement of appellate proceedings provides that "an appeal shall be commenced by filing a notice of appeal and depositing a filing fee of \$25.00, which may be by check or money order payable to the Clerk of the Appellate Court, with the Clerk of the lower court, said check to be transmitted within five days after notice of appeal is filed with clerk of the lower court." (Rule 3.2(a), 31 F. S. A.).

Section 35.22(3), F. S., authorizes the supreme court to establish the fee of the clerk of the district court in connection with appeals to such courts.

Hence, under the applicable statutes and Florida appellate rules, the \$25 fee for the clerk of the appellate court as provided by rule 3.2 is applicable only to appeals taken from the circuit court to the supreme court or district courts of appeal (A. G. O. 057-239, Aug. 12, 1957, 1957-1958 biennial report, p. 285).

When rule 4.7 is considered in the light of §3, Art. V, State Const., authorizing the supreme court to promulgate rules governing the practice and procedure in all courts and when said rule is

considered in light of §25.371, F. S., the question as to the validity of that portion of rule 4.7, fixing the fee of the clerk of the circuit court, is raised. The inherent, constitutional and statutory authority of the supreme court to promulgate rules governing practice and procedure appears to be limited to rules intended to expedite the disposition of cases where possible by enabling the trial courts to clear congested dockets and to expand the judicial discretion of trial courts in procedural matters where full and complete justice requires that such discretion be exercised.

Whatever was intended by that portion of Florida appellate rule 4.7, which purports to regulate the fee of the clerk of the circuit court in connection with appeals taken to the circuit court, I have serious doubt that the court could have contemplated the repeal of the act of the legislature establishing the statutory appellate fee of the clerk of the circuit court at \$3.50, as appears in §28.241(3), F. S. See *Lundstrom v. Lyon*, 86 So. 2d 771; *Shores v. Murphy*, 88 So. 2d 294; *Glassman v. Deauville Enterprises, Inc.*, 99 So. 641; *Fort v. Fort*, 104 So. 2d 69; and *Moore v. Murphree*, 106 So. 2d 430, which define by implication rules of practice and procedure as something other than rules providing fees to be charged by clerks of courts.

Until such time as a contrary determination of this question is made by courts of competent jurisdiction, it is my opinion that the amount of the fee to be charged by the clerk of the circuit court in connection with appeals to that court from the county courts or municipal courts is a matter for legislative determination and that such fees are not matters of practice and procedure, properly a subject for court rule control. Hence your questions are answered as follows:

**AS TO QUESTION 1:**

The fee of the clerk of the circuit court in connection with appeals taken to such court from a municipal court or the county court is \$3.50, as provided by §28.241(3), F. S. Such fee should be collected by the clerk of the lower court at the time of filing the notice of appeal therein and transmitted to the clerk of the circuit court within the time and manner as provided by Florida appellate rule 3.2(a), as modified by rule 4.7. (31 F. S. A.)

**AS TO QUESTION 2:**

The fee of the clerk of the county court in connection with appeals taken to the circuit court would be the statutory fee of \$3.50 as provided by §34.041(2), F. S.

**AS TO QUESTION 3:**

Your question as to the fee of the clerk of the county court in connection with appeals taken to said court from justice of the peace courts has become moot by the adoption of §6, Art. V, State Const., providing that such appeals shall be taken to the circuit court. In those instances the fee of the clerk of the circuit court in connection with such appeals would be as provided for in §28.241(3), F. S., viz., \$3.50, and transmitted in the manner set forth in the answer to question 1.



060-45—March 8, 1960

**ELECTIONS AND ELECTORS**  
**QUALIFICATIONS, ELECTOR, CANDIDATE OFFICE HOLDER**  
**—EFFECT OF PENDENCY OF APPEAL FROM FELONY,**  
**CONVICTION—§§97.041, 99.021, 112.01, 114.01, 837.01,**  
**837.03 AND 924.01, F. S.; §§4, 5, ART. VI AND §25,**  
**ART. XVI, STATE CONST.**

To: D. H. Sloan, Jr., Clerk, Circuit Court, Polk County, Bartow

**QUESTIONS:**

1. Does a conviction of a felony disqualify the defendant as an elector, candidate for office or office holder during the pendency of an appeal from such conviction?

2. May such a person become a candidate for nomination during the pendency of such an appeal with supersedeas?

3. May such a person become a candidate for office during the pendency of such an appeal with supersedeas?

Under §97.041, F. S., "persons convicted of any felony by any court of record whose civil rights have not been restored," are not entitled to vote. This statutory provision is declaratory of §4, Art. VI, State Const., which provides that "no person under guardianship, non compos mentis or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights." These statutory and constitutional provisions go to the question of qualification of electors, but not of state and county officers. Under §837.03, subornation of perjury is "punished in the same manner as for perjury," which, under §837.01, is punished by imprisonment "in the state prison not exceeding twenty years," and is, therefore, under §25, Art. XVI, State Const., a felony.

Under §112.01, F. S., "all persons convicted of bribery, larceny, perjury or other infamous crime . . . shall be excluded from every office of honor, power, trust or profit, civil or military, within this state, and from the right of suffrage; but the legal disability shall not accrue until after trial and conviction by due form of law." This statutory provision was enacted pursuant to §5, Art. VI, State Const., which provides that "the legislature shall have power to, and shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the state, and from the right of suffrage, all persons convicted of bribery, perjury, larceny or of infamous crime . . . but the legal disability shall not accrue until after trial and conviction by due form of law." At common law subornation of perjury was a misdemeanor; however, under the statutes of Florida it is a statutory felony. We are inclined to the view that subornation of perjury, under the laws of this state, is an infamous crime within the purview of §§97.041 and 112.01, F. S., and §5, Art. VI, State Const. (22 C. J. S. 54, §3; 14 Am. Jur. 755-757, §4; 21 W. & P. 251, et seq; 24 A. L. R. 1002, et seq; 52 A. L. R. 2d 1316-1319; 2 L. ed. 1964, et seq.; Adams v. Elliott, 128 Fla. 79, 174 So. 731, text 735).

Therefore, a person convicted of subornation of perjury is

not a qualified elector under §§4 and 5, Art. VI, State Const., and §97.041, F. S. Not being a qualified elector under said §97.041, the convicted person is not able to include in his oath, as a candidate for nomination to office, evidence of his being "a qualified elector of the state" as required by §99.021. Neither would he be qualified to hold any public office of honor, power, trust or profit, civil or military, within the state (§5, Art. VI, State Const., and §112.01, F. S.).

We now come to a consideration of the effect of an appeal from such a conviction of a felony, during the pendency of such appeal; whether the disqualification attaches notwithstanding the appeal, or is deferred until the termination of the appeal. Does a person stand *convicted*, within the purview of §§97.041 and 112.01, F. S., and §§4 and 5, Art. VI, State Const., from the date of the entry of the judgment and sentence in the trial court, or from the disposal of the appeal, when an appeal is taken? Except for the appeal the defendant would stand convicted from the entry of the judgment and sentence by the trial court. In this connection the authorities are in conflict; one line of authorities, including *State v. Langer*, 65 N. D. 68, 256 N. W. 377, holds that the disqualification attaches to the defendant notwithstanding the appeal; the other line of authorities, including *State v. County Election Board of Carter County, Okla.*, 326 P. 2d 782, text 784, holding that the disqualification does not attach while the appeal is pending. Holding that the disqualification attaches notwithstanding the appeal are *Ritter v. Democratic Press Co.*, 68 Mo. 458, text 461; *Quintard v. Knoedler*, 53 Conn. 485, 2 A. 752, text 754, 55 Am. Rep. 149; *State v. Williams*, 110 La. 957, 35 So. 140, text 141; *Hackett v. Freeman*, 103 Iowa 296, 72 N. W. 528, text 529; *People v. Clapp*, 67 Cal. App. 197, 153 P. 2d 758, text 760; *State v. Redman*, 183 Ind. 332, 109 N. E. 184, text 188; and holding that the disqualification does not attach during the pendency of the appeal are *State v. Cox*, 243 Mo. 144, text 146; *Juskulski v. State*, 206 Ind. 503, 190 N. E. 423, text 426; *Scott v. American Express Co.*, Mo., 233 S. W. 492; *White v. Commonwealth*, 79 Va. 611, text 615; *People v. Van Zile*, 141 N. Y. S. 168, text 169; *Woodmen of the World v. Dodd, Tex.*, 134 S. W. 254, text 255; *State v. De Bery*, 150 Me. 28, 103 A. 2d 523, text 525. The disqualifications above mentioned did not in all cases relate to disqualification to vote or hold office but sometimes similar disqualifications. This conflict is reflected in Annotations in 15 Ann. Cas. 103; 18 L. R. A. (NS) 1179; 24 A. L. R. 1290; 79 A. L. R. 38; 106 A. L. R. 644; 113 A. L. R. 1179; 138 A. L. R. 756 and 36 A. L. R. 1238.

This confusion among the authorities in this connection may stem from differences in applicable statutes and constitutional provision, as well as the manner of review of criminal cases, and not altogether conflicting views of the courts. The Florida legislature in 1939 abolished writs of error as a method of reviewing criminal judgments and sentences and substituted in lieu thereof appeals, providing that "the only method of reviewing in prosecution by indictment or information shall be by appeal." (See §924.01, F. S.) Considering the distinction between appeals and writs of error, as used for appellate review, the court in *Whidden v. Abbott*, 119 Fla. 25, 160 So. 475, text 476, stated "that an appeal is a process of civil law origin that entirely removes the cause to

an appellate court, subjecting the facts as well as the law to review and *retrial* in the latter tribunal, whereas a writ of error is a process of common law origin, and *removes nothing* to the appellate court for examination *except the law*." In *Reed v. State*, 94 Fla. 32, 113 So. 630, text 635, the court further stated that "the suing out of a writ of error is not, strictly speaking, a continuation of the suit below to which it relates, but is in the nature of the commencement of a new suit to annul and set aside the judgment of the court below." To the same effect see also 4 C. J. S. 80 and 109, §§11 and 21. Under a writ of error the proceeding in the lower court was not continued in the appellate court, but the writ of error was for the purpose of trying the lower court's judgment and was an original proceeding for that purpose; while on the other hand the appeal removes the entire case to the appellate court for a reexamination of the record. An appeal is a step or proceeding in the original cause (*Federal Land Bank v. Brooks*, 139 Fla. 506, 190 So. 737, text 739, and cases cited; 4 C. J. S. 108, §20). These observations point out material distinctions between the office of a writ of error and an appeal. We feel that the constitution and statutes, relative to disqualification by reason of conviction, contemplate a final judgment which makes final disposition of the cause against the defendant, not a mere order made in the course of the cause which does not make final disposition of the cause. "Until they have been convicted as evidenced by a final judgment they cannot be deprived of the right to hold the office to which" appointed or elected (*Commonwealth v. Reading*, 336 Pa. 165, 6 A. 2d 776, text 778, quoting with approval from *Commonwealth v. McDermot*, 224 Pa. 363, 73 A. 2d 427, text 428). Under an appeal, as distinguished from a writ of error, the cause is transferred from the trial court to the appellate court as a step in the proceeding, which was not the case with writs of error, now abolished.

We, therefore, feel that a conviction within the purview of §§ 4 and 5, Art. VI, State Const., and §§97.041 and 112.01, F. S., becomes final and disqualifies the defendant as an elector and as an office holder when the conviction is no longer subject to further court procedure on direct attack. When an appeal is taken such a conviction is not final and beyond change until finally disposed of by the appellate court. Such constitutional and statutory provisions appear to be penal in nature and should be so construed. When an appeal is taken from a conviction in a trial court the cause moves to the appellate court for further consideration by that court and is subject to change by that court for error in the trial court. When such a conviction becomes final the defendant immediately becomes disqualified as an elector and as an office holder, and may neither vote nor hold office of honor, power, trust or profit. For a person to be a candidate for nomination under Ch. 99, F. S., he is required to be a qualified elector of the state (§99.021, F. S.), so that upon the conviction of a candidate for nomination he is no longer qualified as such candidate.

This conclusion finds Florida support in Advisory Opinion, 75 Fla. 674, 78 So. 673, text 674, where it was stated that "an office is not 'deemed vacant' under §298, of the General Statutes (now §114.01, F. S.), and a conviction is not operative while a supersedeas is effective." Also in *Joyner v. State*, 158 Fla. 806,

30 So. 2d 304, text 305, where it was remarked that "if an appeal has been taken from a judgment of guilty in the trial court the conviction does not become final until the judgment of the lower court has been affirmed by the appellate court."

In the light of the above statutes, constitutional provisions and authorities we are of the opinion that:

1. A conviction of a felony in a trial court will not disqualify the defendant as an elector, candidate for office or office holder, when an appeal is prosecuted from such conviction, until the appeal is disposed of by the appellate court.

This answers question 1.

2. Such a person may become a candidate for nomination during the pendency of such an appeal with supersedeas; however, should the conviction be affirmed prior to the primary election, we feel that the person is no longer qualified as a candidate and his name should not appear upon the primary election ballot.

This answers question 2.

3. Should such a person be nominated prior to the disposition of the appeal, and such conviction be affirmed between the nomination and the general election, such person would become disqualified to hold office and his name should not appear upon the general election ballot.

This answers question 3.

4. A person convicted as aforesaid after election and qualification would be disqualified to hold said office so that, although elected, he may not qualify, or if qualified a vacancy in office would occur upon the affirmation of the conviction and judgment on appeal.

060-46—March 11, 1960

### COURTS

#### REGISTRY OF COURT FUNDS—DESIGNATION OF DEPOSITORIES—DEPOSITORY AGREEMENTS

To: James C. Robinson, Attorney for Orange County, Orlando

#### QUESTIONS:

1. What is the procedure intended by §54.04, F. S., for designating depositories of registry of court funds?

2. What is the procedure for the execution of depository agreements with such designated depositories?

#### AS TO QUESTION 1:

Section 54.04, F. S., provides that moneys paid into court shall be forthwith deposited with the treasurer of the state or in a designated depository of funds for the state.

Section 18.101, F. S., provides that the governor, comptroller and treasurer may designate banks for deposits of public money. When such banks are designated as provided in this section, they are then a designated depository of funds for the state. It is these designated banks that are referred to by §54.04, supra. In coming to this conclusion, I gave consideration to §659.24, F. S., which provides for depositories of public moneys, and §136.02, F. S., which refers to depositories of county moneys. Neither of these sections refers specifically to the depository of funds for the state as does §18.101.

Section 18.101, supra, refers to designation by the treasurer. Sections 136.02, and 659.24, supra, require the designation to be



made by the comptroller. Section 54.01, *supra*, provides that the funds be deposited with the treasurer or designated depositories; and it would thus seem to contemplate that the designation be made by the treasurer.

It is therefore my opinion that §54.04, F. S., contemplates banks designated as depositories as provided by §18.101, F. S., exclusively.

Question 1 is answered accordingly.

**AS TO QUESTION 2:**

After a bank has been designated as a depository for state funds as provided by §18.101, *supra*, it is within the authority of the judge of the court to order moneys paid into the court to be deposited in such designated bank. Section 54.04, *supra*, provides further that such designated bank must furnish security to be approved by and deposited with the treasurer of the state in an amount necessary to fully protect the full amount of such deposit at all times.

Section 54.04 further provides that if the court has not been advised within five days that such security has been deposited with and approved by the treasurer of the state, such court shall forthwith enter its order withdrawing all the funds from such depository.

Because §54.04 continually refers to the court as the agent for depositing and withdrawing funds, it is my opinion that it would be proper for the judge of the court to make the necessary orders rather than the clerk.

I point out that a clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seals, issues process, enters judgments and orders, gives certified copies from the records and the like. While the clerk of a court belongs to the judicial as distinguished from the executive or legislative branch of government, his office is essentially a ministerial one, and is in no way necessary to the existence of a court; that is, while the clerk is an officer of the court, a public officer, and an "officer of the law," he is not a judicial officer. Where (as in Florida) the office is created or recognized by the constitution of the state, it is of course a constitutional office and the clerk is a constitutional officer (14 C. J. S., Clerk of Court, §1).

The judge of a particular court is the proper official to designate a particular authorized depository for state funds as the bank in which moneys paid into the registry of the court under Ch. 54, F. S., should be deposited. After such initial determination is made by the judge, it is my opinion that the responsibility for determining whether said depository has adequate approved security for the registry account rests with the clerk of the court. It is my further opinion that the ministerial function of depositing moneys in the court registry account and withdrawing the same pursuant to court order are ministerial in nature and should be performed by the clerk as a practical matter.

Prior to 1955, §54.05, F. S., required that moneys withdrawn from a court registry be upon vouchers signed by the judge and countersigned by the clerk of the court if the court had a clerk. Section 1, Ch. 29655, 1955, amended §54.05 to read as follows:

*54.05 Money paid into court; withdrawal.*—No moneys deposited as provided in §54.04 shall be withdrawn except

upon the voucher or check signed by the clerk of the court, if the court has an authorized clerk; if not, by the judge of the court, and every voucher or check shall state the cause in, or on account of which, it is drawn.

In view of the above statute, authority, and comments, it is my opinion that where a court has a clerk, moneys deposited under §54.04, F. S., may be drawn from the registry of a court depository without the signature of the judge; where the court has no authorized clerk, such withdrawals shall be made upon vouchers signed by the judge.

It is intended that this opinion shall supersede any and all conflicting provisions appearing in A. G. O. 049-104.

060-47—March 14, 1960

#### REGULATION OF VOCATIONS & PROFESSIONS

STATE BOARD OF BEAUTY CULTURE—HOUR PREREQUISITE FOR GRADUATION FROM BEAUTY CULTURE SCHOOL,  
WAIVER OF—§477.08(1), F. S.

To: *Ethel M. Manning, Executive Secretary, State Board of Beauty Culture, Tallahassee*

#### STATEMENT OF FACTS:

A certain school of beauty culture permits its students to attend school 8 hours per day 6 days per week, making a total of 48 hours per week. By permitting such a study schedule the student may complete the required 1200 hours in six months.

#### QUESTION:

Is it within the authority of the Florida state board of beauty culture or a school of beauty culture to waive the requirement of §477.08(1), F. S., relative to the maximum number of hours per day and the minimum number of months required as a prerequisite to graduation from a school of beauty culture?

Section 477.08(1), F. S., provides, among other things, as follows:

... Such beauty culture school shall . . . require as a prerequisite to graduation a course of instruction and practice of not less than twelve hundred hours of continuous study and practice of not more than eight hours in any one day, within a maximum period of eighteen months and a minimum period of seven months, . . . (Emphasis supplied).

In view of the foregoing statute, it is my opinion that it does not lie within the authority or discretion of the board of beauty culture to waive either the maximum number of hours per day or the minimum period of seven months which the legislature has prescribed as a prerequisite to graduation from an approved school of beauty culture.

I wish to further advise that it is my opinion that not only does a school of beauty culture not have the authority to waive the foregoing stated requirement, but that failure on the part of a school to comply with the said law constitutes grounds for revocation of the certificate of registration issued by the board to the school.

060-48—March 14, 1960

## INSURANCE

CANCELLATION OF INSURANCE CONTRACTS—RETURN OF  
UNEARNED PREMIUM—REQUIREMENTS—CH. 59-205;  
§627.0525, F. S.

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

## QUESTION:

Where an insurer gives notice of the cancellation of an insurance policy, is it necessary that such notice be accompanied with a return or tender of the unearned premiums as a condition precedent to the said cancellation?

The law, generally, upon this question is stated in 45 C. J. S. 96-98, §451, as follows:

Ordinarily, apart from any provision to that effect, the return or tender of the unearned premium to insured is a *condition precedent* to cancellation of the policy by the company, unless the policy provides otherwise, or unless such return or tender is waived, . . . or unless insured is estopped to attack the cancellation for failure to make such return or tender; and insurer, on canceling, becomes indebted to insured for the amount of the unearned premium. In the absence of a statute to the contrary, the parties are at liberty to contract on this subject. If it is provided by the policy, by statute, or by the company's charter or by-laws that the policy may be canceled on notice to insured and on refunding the unearned premium, a return or tender of the unearned premium is a condition precedent, or essential, to cancellation. As to policies containing the standard clause providing for cancellation on notice and requiring the unearned premium to be refunded "on surrender of the policy," the authorities are not in accord; in some jurisdictions it has been held that the cancellation is effective on notice, and that no actual tender or return of the premium is necessary before surrender of the policy, but by the weight of authority a return or tender of the unearned premium is a condition precedent to a valid cancellation under such clause. Likewise, where a policy gives insurer the option to accompany the notice of cancellation with a return of the unearned premium or with a notice that it will be refunded on demand, it is a condition precedent to cancellation that such return be made or such notice given, although cancellation may be effective without such return. However, under a policy provision for cancellation by notice, and for refund of the unearned premium on demand, such refund is not a condition precedent to the right to cancel, and demand is necessary for the return of the unearned premium; and, under a provision for cancellation on notice with or without tender of the unearned premium, and for the refunding of such premium, if not then tendered, as soon as practicable after cancellation, the giving of the notice of cancellation without such tender terminates the policy on the specified date and creates a debtor

and creditor relationship as to the unearned premium.

To the same effect see also 29 Am. Jur. 268, et seq., §§290, et seq. See also Annotation in 127 A. L. R. 1341 and 16 A. L. R. 2d 1200.

In *First National Fire Insurance Co. v. Burnett*, 79 Fla. 424, 84 So. 382, text 383, the supreme court of this state had before it a clause in an insurance policy providing for cancellation by either of the parties and further providing that upon cancellation by the company by notice that the "unearned portion (of the premium) shall be returned on surrender of this policy. . . ." No controlling statute was referred to by the court; the court appearing to have deemed cancellation to have been pursuant to contract. Upon the contract involved in this case the court held that where "an insurance company seeks to cancel a policy by giving five days' notice, the return or tender by the company of the unearned portion of the premium is a *condition precedent* to the cancellation of the policy."

The Florida insurance code (Ch. 59-205) apparently does not require the insertion of a cancellation clause in an insurance policy, nor does said code contain any suggested form to follow (except in regard to disability insurance policies—§627.0525, F. S.). As was pointed out earlier in this opinion, the parties are at liberty to contract as to the form of such clause in the absence of a controlling statute, subject to the approval of policy forms by the insurance commissioner.

In view of the above statements, it is my opinion that return or tender of the unearned premium by the insurer with the notice of cancellation is a condition precedent to such cancellation unless it is otherwise expressly provided in the cancellation clause or otherwise appears in the policy form approved by the insurance commissioner.

060-49—March 14, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
EMPLOYMENT OF MORE THAN ONE PUBLIC BODY SIMUL-  
TANEOUSLY—§5, ART. III, §§15 AND 17, ART. XVI, STATE  
CONST.; §216.171, F. S.**

To: *Gerald L. Howell, Director, Florida Merit System, Tallahassee*  
**QUESTION:**

**May the same person be both an employee of the state or one of its agencies and one of a county or one of its agencies, or of a city or one of its agencies, or of any other public body at the same time?**

So far as we are informed, there is no constitutional or statutory provision in this state specifically prohibiting such dual employment at the same time. However, in view of the provisions of §5, Art. III, and §§15 and 17, Art. XVI, State Const., relative to public officers and §216.171, F. S., relative to state officers and employees, we feel that dual employment, or dual office holding, in this state is frowned on, except in exceptional cases.

Section 17 of said Art. XVI of the constitution provides that "no person shall hold any office of trust or profit under the laws of this state without devoting his personal attention to the duties of the same." Under said §216.171 of the statutes, state employment is limited to a single appropriation or department, thereby evidencing a legislative policy against dual employment of state em-



ployees in the absence of the joint consent of not less than five members of the state budget commission.

In an opinion of Nov. 7, 1952 (1951-1952 biennial report of the attorney general, p. 255), this office, concerning a dual state and county employment of the same person, remarked that "there is no constitutional or statutory provision in Florida prohibiting employment of a person by more than one state or county agency. It is only a matter of public policy to be determined by the county commissioners of Escambia county as to whether a person may be employed in two county jobs."

The public policy expressed by said §17, Art. XVI, *supra*, is that every public officer must give his undivided attention to the duties of his office to the full extent necessary for proper and efficient official duties required by the constitution and statutes in connection therewith. Section 216.171, F. S., evidences a like rule as to state employees. Neglect of duty has been held grounds for the removal of an officer or discharge of an employee (81 C. J. S. 1028, §78, note 92). Under the common law an officer was not permitted to hold two or more incompatible offices; that is, where the duties of one office may interfere with those of the other (42 Am. Jur. 926, 955 and 956, §§59 and 70).

Although there is no express prohibition against one person's holding two public employments, as a general matter, the above constitutional and statutory provisions and authorities evidence a state public policy against such dual employment where it may result in failure to give full attention to either employment, inefficiency because of the dual requirement for duties and obligations, conflicts of interest, or any other matter or thing that may contribute to inefficiency.

Whether or not any person may hold two positions without neglect of duties, inefficiency in employment, etc., is primarily for the decision of his employers, not of himself. This being true, such dual employment should be with the full knowledge and consent of the employers—usually the heads of the employing agencies. It would seem to be the duty of an employee of a public body or agency, should he desire to hold more than one employment, to inform his employing agency, as well as the second agency he desires to obtain employment with, of such dual employment and to keep both employing agencies fully advised.

Although we reach a conditional affirmative answer to the above question, such dual employment should be with the full consent and knowledge of both employing agencies, whether state, county, or local. As to merit system employees, consideration should be given to a rule or regulation governing the question of dual employment, whether one or both, or more, of such employments be state, county, or local, or part one and part another. Although we have here considered them as a single question, we feel that our conclusion furnishes the answer to each of your three questions posed in your request.

060-50—March 14, 1960

**PUBLIC OFFICES, OFFICERS AND RECORDS  
MERIT SYSTEM—FURNISHING OF CERTAIN RECORDS FOR  
PUBLICATION AND PUBLIC INSPECTION—CH. 110;  
§§110.05, 119.01, F. S.**

To: *Gerald L. Howell, Director, Florida Merit System, Tallahassee*  
**QUESTION:**

Is there a duty to furnish merit system records for publication containing information relating to the personnel of the merit system agencies, such as: list of all personnel changes made by agencies, including the name of the employee, the job classification, promotion and transfer, names and total number of employees resigned, laid off and dismissed; names or number of employees hired by agencies for confidential undercover work; and other similarly related personnel information?

The merit system of personnel administration was created pursuant to Ch. 110, F. S. The powers and duties of the merit system council are set forth in §110.05, F. S. Under §110.05, the merit system council has the duty to "recommend the adoption for consideration by the state personnel board, of rules and regulations effectuating the merit system of personnel administration as contemplated by this chapter." Pursuant thereto the state personnel board adopted certain regulations approved by the merit system council.

Under paragraph 4 (h) of the merit system regulations, it is provided that:

h. The Council shall examine into and cause a written report to be made to the State Personnel Board and to the agencies at least annually on the operation of the Merit System, including the conduct of examinations, salary advancements, dismissals, demotions, transfers and separations, and the maintenance of the classification and compensation plans. *A copy of this report shall be open to public inspection.* (Emphasis supplied.)

While this right of inspection is authorized, it would seem that the furnishing of copies of reports is a matter solely within the discretion of the merit system and that in certain instances the gathering of such information will necessitate considerable time, effort, and expenditure on the part of the merit system. Therefore, whether the merit system will furnish copies of its reports will naturally depend upon its feasibility within its budget. This is so notwithstanding that the furnishing of copies of this report for publication purposes will be of interest to the merit system employees as well as to the general public. The merit system would be performing a public service in furnishing copies of its reports.

In your letter you inform me that the merit system will be able to supply most of the information relating to its personnel (as stated in the instant question). In A. G. O. 050-510 I point out that records of the Florida merit system constitute public records subject to inspection by the citizens within the meaning of §119.01, F. S., which section is set forth in said opinion. In opinion 050-510 I point out that the permanent register which lists those persons passing a particular examination, the grades in rank thereon, and the current active register which lists individuals qualified through

a competitive examination according to the grade, rank, and availability for a particular position fall within the definition of public records and are subject to inspection by the public.

There are a few records as to which the right of public inspection has been held not to extend; for example, certain detective and police records, records concerning inmates in institutions, etc. (See *Lee v. Beach Pub. Co.*, (Fla.) 173 So. 440; A. G. O. 050-316; and A. G. O. 053-32.) Analogously, and for similar reasons, there may be a few rare instances where the names of investigating personnel performing law enforcement work or work closely related thereto could properly be kept confidential for security reasons.

Therefore, your question is answered as follows:

It is my opinion that although there is no duty to furnish merit system reports and records for publication containing information relating to the personnel of the merit system agencies, it would be of considerable public interest and value to furnish such reports where possible (where no budget impairment will result and excluding information relating to the confidential employees). The above reports and records of the merit system are open to public inspection subject to my comments relating to reports of a confidential nature.

060-51—March 14, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
ANTI-NEPOTISM LAW AS APPLYING TO ADOPTED RELATIVES—§§116.10, 72.22 AND 731.30, F. S.**

To: *Bryan Willis, State Auditor, Tallahassee*

**QUESTION:**

**Can a justice of the peace employ both his sister and his adopted brother in view of the provisions of §116.10, F. S., prohibiting nepotism by certain public officials?**

Section 116.10, F. S., prohibits the employment by certain officers of persons related to them within the fourth degree by consanguinity or by affinity; and such employment is declared by said statute to constitute misfeasance or malfeasance in office, subject to removal from office therefor. The statute contains a proviso that the provisions of this section shall not apply to such public officers who employ only one person related to them as set out above. This statute has been held to be penal in nature and, consequently, must be strictly construed (*State ex rel. Robinson v. Keefe*, 111 Fla. 701, 149 So. 638).

The term "consanguinity" is defined as "the connection or relation of persons descended from the same stock or common ancestor; blood relationship." The term "affinity" is defined as the "connection or relation existing in consequence of a marriage between each of the married persons and the kindred of the other." (*Black's Law Dictionary*, 4th Ed., 1951, p. 375). In *State ex rel. Robinson v. Keefe*, supra, the court discussed the provisions of the antinepotism statute, and it stated:

"Nepotism" has been defined as the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee. The Florida act should be con-

*strued in the light of its obvious purpose to discourage "nepotism" as above defined (Emphasis supplied) (text 638).*

In view of the obvious purpose for which §116.10 was enacted by the legislature, as pointed out in the Keefe case, *supra*, it is my belief that an adopted child is within the class prohibited under §116.10, *supra*. The above conclusion may be justified further by examining the provisions relating to the effect of adoption as stated in §§72.22 and 731.30, F. S., respectively, as follows:

By the decree of adoption the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privileges, and subject to all obligations, of a child born to such parent or parents in lawful wedlock. . . . An adopted child, whether adopted under the laws of Florida or of any other state or country, shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents, and the adopting parents shall inherit from the adopted child. *The adopted child shall be regarded as the natural brother or sister of the natural children and other adopted children of the adopting parents for the purpose of inheritance from or by them.* The adopted child shall inherit the estate of his blood parents, but his blood parents shall not inherit from the adopted child (Emphasis supplied).

Considering, then, the purpose of enacting §116.10 and the statutes relating to the effect of adoption, it is my opinion that your question should be answered as follows:

The employment by a justice of the peace of both his (natural) sister and his adopted brother at the same time is contrary to the obvious purpose and intent of the antinepotism provisions of §116.10, F. S., and is prohibited thereby. The justice of the peace may employ only *one* of the above-named related persons.

Your question is therefore answered in the negative.

It should be noted that the specific question involved herein has not heretofore been judicially construed in this state and that the instant construction of the provisions of §116.10, *supra*, in regard to their application to employment of adopted relatives, is one of first impression.

It is not my intention to condone any violation of §116.10; however, in view of the particular circumstances and the difficulty in which a public officer would be placed in determining a statute's applicability, it is my belief that reasonable notice of the instant construction should be given to the public official involved herein (as well as to others) for the purpose of affording him an opportunity to comply with the provisions of §116.10.

060-53—March 15, 1960

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS**  
**RETAIL INSTALLMENT SALES LAW—LICENSES AND**  
**LICENSE TRANSFERS—§§520.30-520.42, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

May licenses issued under and pursuant to §520.32,



F. S., be transferred from one licensee to another, or from one location to another?

Section 520.32, F. S., imposes an annual license fee upon persons, firms and corporations within the purview of §§520.30-520.42, inclusive, F. S., "for the privilege of conducting, engaging in and carrying on the business of retail seller engaged in retail installment transactions" in this state. Nowhere within said sections is there express authority for the transfer of such licenses, either between parties or between locations. "As a general rule a license cannot be transferred without the consent of the licensing authority, unless the license statute or ordinance provides otherwise" (53 C. J. S. 657, §45). "A license, being a personal privilege, cannot, as a general rule, be communicated or assigned to another." (33 Am. Jur. 330, §6).

Under §205.03, F. S., "all business licenses may be transferred with the approval of the comptroller" under the regulations there imposed. This provision unquestionably relates to licenses issued under Ch. 205, F. S., which are licenses and license taxes for revenue and not regulatory purposes. Sections 520.30-520.42, inclusive, F. S., which relate to installment sales and provide regulations and limitations upon such sales within this state, as a whole, and particularly §§520.32 and 520.42, which impose a license tax or fee of \$5 per annum, state that the proceeds of which license tax or fee are "appropriated to the state comptroller's office for the purpose of administering the provisions of" said §§520.30-520.42, inclusive. Therefore, these taxes or fees are allocated not to the general revenue fund or general state use, but to the enforcement of, and regulation under, said §§520.30-520.42, inclusive, F. S. Such taxes and fees are allocated by the statute to the payment of the costs and expenses of the regulation and control of installment sales and business under said sections.

"As an incident to its power to enact valid inspection laws, a state may impose a reasonable fee or charge for the purpose of defraying the expenses of inspection, but such a fee is not a tax." (44 C. J. S. 403, §12). "A license fee may be imposed under the police power which will legitimately assist in the regulation of the business or occupation for which it is exacted. . . . Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered or required, and such a fee is valid if reasonably commensurate with such services" (33 Am. Jur. 366-367, §43). Sections 520.30-520.42, inclusive, F. S., impose a license tax or fee for regulatory purposes, while Ch. 205, F. S., and similar statutes and laws, impose a license tax or fee for revenue and not regulatory purposes. The regulatory license fees imposed by said §§520.32 and 520.33, have not been substituted for and in lieu of those imposed under Ch. 205 and similar statutes, but are in addition thereto.

Nevertheless since any person, firm or corporation subject to the regulatory license fee imposed by said §§520.32 and 520.33, would also be required to be licensed under and pursuant to Ch. 205, or other similar law, under which licenses may be transferred, with the approval of the comptroller, we hold that the licenses under said §§520.32 and 520.33 may be transferred, *as an incident to a transfer of the occupational license under §205.03 and in the same manner and under the same requirements.*

The above stated question is, therefore, answered in the affirmative, subject to the above mentioned limitations.

060-54—March 15, 1960

### COURTS

#### DISPOSITION OF UNCLAIMED FIDUCIARY FUNDS DEPOSITED IN REGISTRY OF COURT; PROCEDURE— §§28.24; 54.06 AND 69.16, F. S.

To: *George L. Carlisle, Clerk, Circuit Court, Clay County, Green Cove Springs*

#### QUESTIONS:

1. After the clerk of the court publishes the legal notice and upon the expiration of the 30-day period outlined in §69.16(1), F. S., may the clerk withdraw the money from the registry of court without any further court orders?

2. Is the clerk of the court entitled to compensation for depositing with the state treasurer fiduciary funds in the court registry as required by §69.16, F. S.?

#### AS TO QUESTION 1:

Section 54.06, F. S., sets out the general requirements for disposition of unclaimed funds paid into court. This section provides that after five years, upon direction of the judge of the court, such money shall be deposited with the state treasurer. However, the provisions of §69.16, F. S., do not require nor contemplate an order of the court or any directive from the judge as such provision is completely omitted as contrasted with §54.06, supra, where such provisions are expressly stated. It therefore follows that the legislative intent in passing §69.16 was that the only condition precedent to the withdrawal of the money by the clerk was the express condition of the expiration of 30 days and that no unexpressed conditions are implied.

Question 1 is accordingly answered in the affirmative. However, as your letter implies that the funds were deposited pursuant to court order, it would be a better procedure to sanction their removal by court order. This would offer you maximum protection in regard to your own responsibility for the funds.

#### AS TO QUESTION 2:

Section 28.24, F. S., provides that the clerk of the court will be entitled to compensation for "moneys, received into registry of the court and paying out."

Section 69.16 (1), F. S., requires that the funds be deposited by the clerk in the registry of the court. A. G. O. 052-164, dated May 27, 1952, p. 42 of the 1951-52 biennial report of the attorney general, held that the clerk of the court is not entitled to compensation until the moneys are paid out of the registry. Once the funds have been deposited with the state treasurer, they are in effect withdrawn from the registry of the court because §69.16(2), supra, states that the state treasurer shall deposit the same to the credit of the state school fund to become a part of said school fund. The effect of this disposition is that the funds are out of the court registry. The ultimate destination of the funds, whether to the school fund or to a private individual, does not determine whether the moneys are paid out of the court registry. If the court re-

linquishes all rights to the funds, it follows that the funds have been paid out regardless of destination; and the clerk of the court is entitled to the fee provided by §28.24, F. S., for the paying out of money from the court registry.

Question 2 is accordingly answered in the affirmative.

060-55—March 17, 1960

#### TAXATION

#### INTANGIBLE PERSONAL PROPERTY TAXES—BONDS OF INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT—CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are the bonds issued by the international bank for reconstruction and development, owned by residents of Florida, subject to taxation under the Florida intangible personal property taxing statutes?**

The international bank for reconstruction and development appears to be an agency of the united nations, which was organized and established by articles of agreement signed by 44 of the united nations. We are not advised as to the present number of member nations subscribing to such articles of agreement. The said articles of agreement are set out on pp. 752-766, of the year book of the united nations for 1946 and 1947. We are here concerned only with the question of taxation of bonds issued by the said bank, and not with its other activities, properties, duties, etc. Section 9, of Art. VII, of said articles of agreement, provides as follows:

#### Immunities from taxation

(a) The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Bank (including any dividend or interest thereon) by whomsoever held—

(i) which discriminates against obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held—

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

The U. S., and its agencies, when engaged in governmental functions, are exempt from state taxation, and especially "where such taxation would impair their (the bonds) usefulness and efficiency." (84 C. J. S. 393, et seq., §§207, et seq.). Bonds, certificates of indebtedness and other obligations, issued by the U. S. and its agencies, as security for loans are within the rule of immunity from state taxation (84 C. J. S. 401 and 493-494, §§209 and 257). Governmental agencies are entitled to the same tax exemptions, as the government itself, as to their governmental functions (84 C. J. S. 492-493, §§255 and 256). The united nations is a confederation between nations for a governmental purpose, and has congressional recognition, as has the international bank for reconstruction and development, an agency of the united nations. (Title 22, §§286, et seq., U. S. code). Both the united nations and the international bank for reconstruction and development are agencies of a group of nations, of which the U. S. is one. The said bank is an agency of the U. S. and the other nations in the confederation. The said bank, for the purposes of state taxation, is to be considered as an agency of the U. S. and exempt from state taxation, except to the extent authorized by congress. The same rule applies to bonds, certificates of indebtedness and other obligations issued by the said bank.

The articles of agreement, between the united nations, of which the U. S. is one, establishing the international bank for reconstruction and development, being the action of a confederation of nations, has the force and effect of law and is binding on the U. S. and the several states. This being true, bonds, certificates of indebtedness and other obligations issued by the said bank, are exempt from state taxation except to the extent permitted by said articles of agreement establishing the said bank, that is, by §9, Art. VII, of said articles of agreement hereinabove set out. The extent of state power to tax such bonds, certificates of indebtedness and other obligations, is authorized by said section and only to the extent permitted by said section.

These observations answer the above stated question, and such bonds are taxable to the extent permitted by said §9, Art. VII, of said articles of agreement. However, under Ch. 199, F. S., we doubt that taxes may be imposed upon such bonds.

060-56—March 21, 1960

#### TAXATION

LONG TERM LEASE LANDS — DOCUMENTARY STAMP TAXES—HOMESTEAD TAX EXEMPTION — CH. 201; §§199.02 AND 192.06(1) AND (2), 689.01, F. S. — §1, ART. VIII, §1, ART. IX, §7, ART. X AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Are documentary stamp taxes due, under Ch. 201, F. S., on long term leases of real property, and if so, under what section may such taxes be imposed?

2. Is a mortgage encumbering such a long term lease to secure the payment of a written obligation to pay money subject to taxation as class "C" intangible personal property?



3. Would the owner and holder of such a long term mortgage, upon which had been constructed a dwelling house, residing upon the same and making it his permanent home, etc., be entitled to homestead tax exemption under §7, Art. X, State Const.?

4. May the permanent buildings erected upon the said leased property be assessed as property of the lessee, and if not, to whom may they be assessed?

The question of the status of leasehold interests in real estate for long terms was considered by the supreme court of this state in *Dundee Corp. v. Lee*, 156 Fla. 699, 24 So. 2d 234; in *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924; and *De Vore v. Gay*, Fla., 39 So. 2d 796. The theory in each of these cases seemed to differ. *Dundee Corp. v. Lee*, supra, considered a 99 year lease; the other two cases involved short term leases (evidently two and three year leases). In the first *De Vore* case, which involved a two or three year lease, the court stated that "the present case should *not* be distinguished from the *Dundee* case because there the lease was to continue for 99 years while the ones involved here were to run for only two or three years. . . ." In the second *De Vore* case the court, concerning a two or three year lease, stated that "under the circumstances, rent to be paid in the future is not a debt until it becomes either due or owing; and when the leases were executed no rent was either due or owing. When taxes are to be levied according to a monetary consideration, the law contemplates that such tax shall be confined to the actual monetary considerations or to considerations which have a reasonably determinable pecuniary value. The sole considerations passing to the lessors for the leases were executory considerations." The particular lease before us is one from the Santa Rosa Island authority described in the said lease "as an agency for a consideration of \$315.00 per annum during the term of said lease (99 years).

The grantees in the above mentioned 99 year lease made, executed and delivered their mortgage, encumbering the above mentioned lease and their interest therein, to a building and loan association, for the purpose of securing a promissory note. "At common law estates for years were classified as chattels real and regarded as personal property. *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P. 2d 962, 103 A. L. R. 822. Of similar import was the holding in *Townsend v. Boyd*, 217 Pa. 386, 66 A. 1099, 12 L. R. A. (NS) 1148." (*De Vore v. Lee*, 158 Fla. 608, 30 So. 2d. 924, text 926). In this connection see also 51 C. J. S. 531, §26; 32 Am. Jur. 39, §16; 2 Cooley on Taxation, 4th Ed. 1268, §593; 3 Thompson on Real Property, 1959 Replacement, 6, §1016; 11 C. J. S. 385, §2; 31 C. J. S. 27, §12; 73 C. J. S. 172 and 173, §8; *Curington v. State*, 89 Fla. 494, 86 So. 344, text 345; *Mathews v. McCain*, 125 Fla. 840, 170 So. 322, text 325. Notwithstanding that a lease of real property for a term of years is within the statutes of frauds (§689.01, F. S.) and must be in writing, it is, nevertheless, personalty and not realty.

Under §1, Art. IX, State Const. "as to any obligation secured by mortgage, deed of trust, or other lien, the legislature may prescribe an intangible tax of not more than two mills on the dollar, which shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations." Class "C" intangible personal property is defined in §199.02(3), "as being all

notes, bonds and other obligations . . . for payment of money which are secured by mortgage, deed of trust, or other lien upon *real property* situated in Florida." Although the constitutional provision merely mentions mortgages, deeds of trust and other liens, there being no limitation therein to real property, the legislature has seen fit to extend the constitutional provision to mortgages encumbering real, and not personal property. Here the mortgage in question encumbers a leasehold interest in real property for a term of years, which is in law personal and not real property.

Under §7, Art. X, State Const., for one to claim homestead tax exemption upon real property in this state he must have "the legal title or beneficial title in equity" to the lands sought to be exempted under said section. A leasehold interest for a term of years not being real property said §7, Art. X, State Const., has no application (1953-1954 A. G. O. 312).

Under paragraph numbered (4) of the lease in question the "Title to any building or other improvement of a permanent character that shall be erected or placed upon the demised premises by the lessee shall forthwith vest in said Escambia County, subject, however, to the term of years and option to renew to the lessee by the terms of this lease." Santa Rosa island appears to be the property of Escambia county (see Chs. 14024, 24500 and 27881, 1929, 1947 and 1951). Of interest is *Park-N-Shop, Inc. v. Sparkman*, Fla., 99 So. 2d 571, text 573, Art. IX, and §16, Art. XVI, State Const., and the provisions therein for tax exemptions, stated that "these decisions are of no assistance because the primary problem is whether or not a tax may be levied on property of the county. . . . After a careful study of appropriate provisions of the constitution and the statutes we decide that property of the state and of a county, which is a political subdivision of the state (§1, Art. VIII) is *immune* from taxation, and we say this despite the reference to such property in §192.06 (1) and (2), *supra*, as being exempt." (See also 84 C. J. S. 475-478, §253 and 51 Am. Jur. 550-551, §557.) The leasehold interest here considered appears to be within the rule of *Park-N-Shop, Inc. v. Sparkman*, *supra*, as the property here, as in that case, is county property.

Under present existing laws, the interest of the lessee is not subject to taxation, and that of the county is tax exempt. As the "title to any buildings or other improvements of a permanent character," under the lease here involved, vested in the county upon their completion, the lessee has no property interest in the building itself—merely a right of user under the lease—although constructed by said lessee.

Under these authorities, it seems that each of the above stated questions should be answered in the negative, if their status is as herein determined. However, the promissory notes or other written obligations to pay money, secured by mortgages encumbering said leasehold estates would seem to be class "D" intangible personal property and subject to taxation as such.

060-57—March 22, 1960

### CRIMINAL PROCEDURE

#### BAIL BOND — REMITTANCE OF FORFEITURE UPON RETURN OF DEFENDANT BY BONDSMAN OR SURETY —

CH. 59-192 AMENDING §903.29(1), (2); §§903.16, 903.26, 903.28, F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee

#### QUESTION:

Does the 30-day period in the proviso in Ch. 59-192, relating to the refunding of forfeiture to a bondsman or surety who returns the defendant within 30-days from the "date of such judgment," cause the 30-day period to begin to run when the forfeiture of the undertaking is first ordered by the court before which the cause is pending or only after judgment and execution on the enforcement of the forfeiture is entered by the circuit court?

The applicable proviso found in §1 of Ch. 59-192, states that the judgment will be vacated upon the return of the defendant within the 30-day period except where the *trial court* shall find that failure to sooner apprehend the defendant has defeated the ends of justice. Paragraph (2) of Ch. 59-192, *supra*, provides:

(2) At any time within 30 days from the *date of forfeiture* of undertaking the bail bondsman or surety may arrest the principal for the purpose of surrendering him to the executive officer of the court having jurisdiction of the case. (Emphasis supplied.)

Paragraph (1), *supra*, anticipates that the bail bondsman will return the defendant within a period of 30 days from the date of "such judgment."

Paragraph (2), *supra*, gives the bail bondsman the power to arrest 30 days from the date of forfeiture. The italicized phrase, date of forfeiture, in paragraph (2) is defined in §903.26, F. S. It is the date the court before which the cause is pending declares the undertaking forfeited. This step precedes the provisions for entry of judgment on the undertaking in §§903.28 and 903.29, F. S. Date of forfeiture cannot be synonymous with judgment on the undertaking because §903.28, F. S., states that judgment on the undertaking may take place 30 days after the date of forfeiture.

The title of Ch. 59-192, *supra*, provides:

AN ACT amending Sections 903.29 and 903.31, Florida Statutes, and thereby providing that bondsman or surety may return defendant within thirty days from the *date of forfeiture* and receive refund of forfeiture; . . ." (Emphasis supplied.)

The italicized words clearly state that the 30-day period begins to run from the date of forfeiture.

In the case of Jackson Lumber Co. v. Walton County, 116 So. 785, it is stated at p. 785:

Especially may the title be consulted as an aid to interpretation where, as is the case in many states, the Constitution provides that the subject of the act shall be expressed in the title, for under such constitutional provisions, the title becomes a part of the act itself, and, upon

the principle that an act will not be construed into unconstitutionality if another construction is possible, may be a limitation upon the enacting part of the law.

If the judgment referred to in the body of the act was held to mean the judgment on the undertaking, the title of this act would be misleading and probably cause the act to be held unconstitutional as violating §16, Art. III, State Const., requiring that the title of the act give notice of the subject matter contained therein. The statute should definitely be construed in such a manner as to uphold its constitutionality. Therefore, the phrase "date of such judgment" contained within the body of Ch. 59-192, should be held to refer to the judgment occurring at the date of forfeiture as set out in the title of such act.

Under §903.26, F. S., where there "is a breach of the undertaking (bail), the court before which the case is pending shall declare the undertaking, and any money or bonds that have been deposited, *forfeited. Fifteen days after the forfeiture . . .* all officials having in their custody monies deposited as bail, which have been forfeited, shall turn such moneys over to the county. . . ."

The court, in *Young v. Stoutamire*, 131 Fla. 535, 179 So. 797, text 799, concerning a cash deposit to secure an appearance in court, said that "on default, for noncompliance with the conditions to secure the fulfillment of which the deposit was made, *it became forfeited.*" Where there is a breach of a criminal bail undertaking, the court before which the cause is pending makes a record thereof and *declares the undertaking forfeited* (§903.26, F. S.).

"Upon said undertaking being forfeited, the clerk of the trial court shall immediately transmit the undertaking and any affidavits, to the clerk of the circuit court . . . who shall record the same in the deed book," so that the same will become a lien on real property of the bondsman if said bondsman has given a surety bond (§903.26, F. S.). "If the *forfeiture* is not discharged, and the undertaking is one secured otherwise than by the deposit of money or bonds," as authorized by §903.16, F. S., "after the lapse of thirty days *after the date of forfeiture*," the forfeited undertaking is enforced by the state attorney in the circuit court (§903.28, F. S.). The primary purpose of the proceedings under §903.28, F. S., is the enforcement of the bond obligations of the sureties upon any surety bond given as bail. Where a cash bond or negotiable securities are posted by the defendant, no proceeding is necessary under §903.28, F. S. Surety bonds are legal obligations enforceable *against the sureties* in a court of law, not in the criminal courts.

The date of the "forfeiture of undertaking" mentioned in §903.29(2), F. S., is the date of the making of the record of the forfeiture and of declaring the undertaking forfeited under and pursuant to §903.26, F. S., and not of the judgment or decree enforcing the obligation of sureties as contemplated by §903.28, F. S.



060-58—March 24, 1960

**CRIMINAL PROCEDURE**  
**PRELIMINARY HEARING—ABSENCE OF DEFENDANT—**  
**CH. 902; §§902.02, 902.08 AND 914.01, F. S.**

To: *Francis K. Whitaker, Justice of the Peace, First District, Orlando*

**QUESTIONS:**

1. May a defendant who has requested a preliminary hearing before a committing magistrate pursuant to the provisions of Ch. 902, F. S., have his attorney appear for him at the preliminary hearing, and the said hearing be conducted without the defendant being physically present?

2. If said hearing can be conducted without the physical presence of the defendant, what should the committing magistrate require from the defendant by way of consent to proceed with the hearing in this manner?

**AS TO QUESTION 1:**

I find no statute which specifically requires that a defendant be present at his preliminary hearing, but he is usually present as a matter of course. Also, §902.08, F. S., requires that all witnesses at such a hearing shall be examined in the presence of the defendant and may be cross-examined. However, I think that this statutory requirement is for the benefit of the defendant and confers a right upon him which he may waive with the consent of the magistrate.

In *State ex rel Poul v. McLain* (N. D.), 102 N. W. 407, it appears that Poul furnished bail for his appearance at a hearing to be held before the justice of the peace on December 29; that on that day the hearing was adjourned until December 31 because of Poul's illness; that on December 31, at the time fixed by the adjournment, Poul did not appear and the justice of the peace proceeded to hear the evidence in his absence, his attorney being present, and after the hearing made an order committing Poul to answer the charge at the next term of the district court and fixed the amount of his bail; that Poul, being confined in jail pursuant to said commitment, instituted a habeas corpus proceeding and contended, among other things, that the commitment was void because the evidence upon which the justice of the peace issued it was taken in Poul's absence. North Dakota had a statute, §7960, which, like Florida's §902.08, required that the witnesses at a preliminary hearing be examined in the presence of the defendant. In rejecting Poul's complaint and denying his petition for a writ of habeas corpus, the supreme court of North Dakota concluded its discussion by saying:

We are clearly of the opinion that section 7960 simply makes it the duty of the magistrate to afford the defendant the right to confront the witnesses against him, and that if the defendant is out upon bail, and refuses or neglects without cause to appear at the time fixed for the hearing, he has waived his right to personally confront the witnesses. In this case there is no showing that the petitioner could not have been present at the time of

the hearing. It must therefore be presumed that he voluntarily absented himself from the examination. To hold that the right to examine the witnesses depends upon the personal presence of the accused when he is at liberty on bail would lead to the absurd result that the accused would have it in his power to indefinitely postpone the examination by voluntarily absenting himself from the hearing either before its commencement or during its progress. Section 7960 guarantees to an accused person the right to confront and cross-examine the witnesses against him at a preliminary hearing. If that right has not been denied to the accused, he will not be heard to object to the regularity of the proceedings that he did not enjoy the right because he voluntarily chose not to avail himself of it.

I agree with the North Dakota court's conclusion that a magistrate has the power to conduct a preliminary hearing without the defendant being present, when the defendant has voluntarily waived his right to be present. I am strengthened in this view by the fact that §902.02 permits a defendant to entirely waive his right to a preliminary hearing, and, since he can do that, I see no reason why the magistrate cannot permit him to waive his lesser right to be personally present at his preliminary hearing.

It is true that §914.01 requires the presence of the defendant at his trial for a felony, although it provides that persons prosecuted for misdemeanors may, at their own request, by leave of the court, be tried in their absence from the court. However, this statute has nothing to do with preliminary hearings on either felony charges or misdemeanor charges. There is a vast difference between a trial and a preliminary hearing. A trial is for the purpose of determining the guilt or innocence of the defendant. On the other hand, a preliminary hearing is simply a course of procedure whereby a possible abuse of power may be prevented and the accused discharged or held to answer, as the facts warrant (22 C. J. S. 483, Criminal Law, §331); it does not involve a determination of guilt or innocence.

Although §914.01 does not apply to preliminary hearings, I note that it contains a proviso that if the defendant is present at the beginning of his trial and thereafter voluntarily absents himself without leave of court, the trial shall proceed as though he were present in court at all times. And even before said statute was enacted and at a time when a Florida statute provided that no person prosecuted for felony could be tried unless personally present during the trial, the supreme court of Florida held that a defendant on trial for first degree murder was not entitled to a reversal because his trial proceeded while he was voluntarily absent from the courtroom for a few minutes. The supreme court held that said statute was for the benefit of the defendant and that the right to be present which it guaranteed could be waived (*Lowman v. State*, 85 So. 166).

I do not think that a defendant has an absolute right to demand that a preliminary hearing be conducted in his absence. However, it is my opinion that it is within the sound discretion of the committing magistrate to conduct a preliminary hearing in the defendant's absence, upon the basis of a voluntary waiver by the

defendant of his right to be present. In determining whether to exercise or to refrain from exercising that discretion in a particular case, the magistrate should take into consideration the facts surrounding the case. If such a course is followed, the defendant has the right to have his attorney represent him at such preliminary hearing.

Therefore, subject to the foregoing observations, question 1 is answered in the affirmative.

#### AS TO QUESTION 2:

I have found no statute or decided case which supplies the answer to the question of what a magistrate should require from a defendant by way of consent before conducting a preliminary hearing in the absence of the defendant.

However, I think that the safer course for a magistrate to follow when the defendant is charged with a felony would be to require:

(1) That the defendant personally appear before the magistrate and request that his preliminary hearing be conducted in his absence, with such request to be made verbally or in writing as may be required by the magistrate; or

(2) That a written request to that effect, signed by the defendant, be presented to the magistrate by the defendant's attorney.

Either of said courses may be followed when the defendant is charged with a misdemeanor, or, if the defendant has specifically authorized his attorney to make such a request, the magistrate may permit such attorney to make it in behalf of the defendant.

060-59—March 24, 1960

#### ESTATES—PROBATE—TAXATION DISTRIBUTION WITHOUT ORDER OF PROBATE COURT— INTANGIBLE PERSONAL PROPERTY TAXES—§§734.02- 734.04 AND 733.23, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Does the distribution of intangible personal property of a decedent's estate, without an order of the probate court, either authorizing or approving such distribution, to the heirs or legatees, vest title in the distributees?**

It appears from the file, handed us with the request for opinion, that the above question arises in connection with an estate probated in Pinellas county where, after the expiration of the time for filing of claims and the collection of the assets of the estate into the hands of the personal representative, the intangible personal property of the estate was distributed to the legatees entitled thereto under the will. Although personal representatives are not required to make distribution until after a stated period of time (§§734.02-734.04, F. S.), they are not expressly prohibited from making such distribution, although such distribution will be made at their risk (§734.02, F. S.). We find no provision relative to the distribution requiring a court order as a condition of the passing of title to a distributee, as is contained in §733.23, F. S., relative to sales of assets of estates.

**"Voluntary payments or distributions to distributees without**

an order or decree of court authorizing them are made by the representative at his peril; but although they are irregular and voidable they are generally regarded as legal." (34 C. J. S. 410, §503). The general rule is that title under such circumstances passes to the legatee or heir (34 C. J. S. 411, §503, notes 95 and 96).

The above question is answered in the affirmative, so that title passed to the distributees as of the time of such distribution, that is, during the year of 1958 and prior to Dec. 31, 1958, according to letter of Fred J. Wilder handed us with your request. If this is found to be true the properties so distributed were not subject to taxation as property of the personal representative for 1959.

060-60—March 24, 1960

**RETIREMENT  
PRORATION, FIREMEN'S RELIEF PENSION FUND—  
§175.19, F. S.**

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*  
QUESTION:

**When should the proration set forth in §175.19, F. S., begin and how should it be prorated?**

Section 175.19, F. S., provides:

In no case shall any pension allowable under the provisions of this chapter exceed the sum of one hundred dollars monthly and should the pension fund of any city or town herein provided for be insufficient to make full payment of the amount of the several pensions which may be allowed under the provisions of this chapter, then said funds shall be prorated, on a monthly basis among those entitled to receive such pensions by the board of trustees, in full satisfaction of their respective claims.

It is my opinion that the above section provides that when at a given time the existing pension fund is insufficient to make full payment of the amount of the pensions authorized under Ch. 175, the funds available should be prorated among those entitled to receive such pensions.

The following explains perhaps more clearly my interpretation of the meaning of this section: Where on the first day of the month the pension fund available for payment to then authorized pension recipients amounts to \$5,000, and there are 50 pensioners eligible to receive the \$100 monthly maximum for that month, there would be no need for proration.

However, under the same factual situation, if during the month immediately preceding, an additional 15 persons were declared eligible to receive pensions to be paid out of the same fund available, the result would be as follows: The \$5,000 fund available would be divided by the 65 persons eligible to receive payment. Thus, each of the 65 persons eligible to receive pension funds would in fact be entitled to \$77.07 for that month.



060-61—March 25, 1960

**ELECTORS AND ELECTIONS**  
**DISTRIBUTION OF FILING FEES AND PARTY ASSESS-**  
**MENTS BY COUNTY CLERKS—§99.061(3), F. S.**

To: *James M. Milligan, Chairman, State Democratic Executive Committee, Orlando*

**QUESTION:**

How should the clerks of the board of county commissioners of the respective counties distribute the filing fees and party assessments collected from candidates for public office?

Normally, the 2% party assessment is paid directly to the county political party executive committee, for which the candidate is issued a receipt to be presented to the clerk along with his qualification papers and the 3% filing fee. If, however, the clerk should be authorized by the local county political party executive committee to collect the 2% party assessment then this money should be returned directly to the county committee of the party of which the candidate is a member.

As for the disposition of the remaining 3% filing fee, 2% goes into the county general revenue fund for the purpose of defraying a portion of the expense of the election. Under the amended §99.061(3), F. S., the remaining 1% goes to the "secretary of the state executive committee of the political party to which the candidates belong, within 60 days after the closing of the qualifying time, . . ."

In summary, the 5% filing fee and party assessment is distributed by the respective clerks of the board of county commissioners as follows:

- 2% to county political party executive committee of the party of which the candidate is a member
- 2% to county general revenue fund
- 1% to secretary of state political party of which candidate is a member

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5% total

Your question is, therefore, answered accordingly.

060-62—March 29, 1960

**MUNICIPALITIES**  
**MORTGAGING MUNICIPAL PROPERTY—BANK LOANS—**  
**§§6 AND 10, ART. IX, STATE CONST.; CH. 169, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTIONS:**

1. May a state bank make loans to municipal corporations secured by mortgages encumbering municipal real property?

2. May a state bank make loans to municipal corporations to be secured by rentals from a municipal building and taxes to be levied from time to time?

Municipalities generally have statutory authority to borrow money, contract loans, issue bonds and other evidence of indebted-

ness, unless otherwise limited by their corporate charters (Ch. 169, F. S.), subject to the requirement of §6, Art. IX, State Const., and applicable laws.

Section 6, Art. IX, State Const., prohibits the issuance of state bonds, except for the purpose of repelling invasion or suppressing insurrection, and permits the issuance of county, municipal and local bonds without the approval of the freeholders of such county, municipality or locality, as required by said constitutional provision. In *Brash v. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827, the state board proposed to borrow money and secure the payment of the same by mortgage encumbering certain real properties of the said board, then owned by the board and to be acquired with the money to be borrowed. This the court held to be within the prohibition of said §6, Art. IX, State Const., prohibiting the issuance of state bonds except as otherwise provided in the said amendment.

In *Boykin v. River Junction*, 121 Fla. 902, 164 So. 558, it was held that a freeholders' election was necessary where a municipality proposed to secure the payment of revenue certificates by not only pledging the income from its utility but also mortgaging the physical properties of the same and contingent franchise. In *State v. Florida State Improvement Commission*, Fla., 60 So. 2d 747, text 757, a dissenting opinion stated that "a pledge or mortgage of physical property, even that acquired by the issuance of the certificates, was held to be prohibited in *Boykin v. Town of River Junction*, 121 Fla. 902, 164 So. 558 and *Brash v. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827."

"Bonds" within the purview of §6, Art. IX, State Const., include any contractual devise for present funding of tax revenues contemplated to be raised or made available for reimbursement in future years through ad valorem taxation (*State v. Florida State Improvement Commission*, Fla., 47 So. 2d 627, text 631). Taxes levied and assessed may be pledged by the county, municipality or local authority, so long as future tax levies and assessments are not pledged (*Leon County v. State*, 122 Fla. 505, 165 So. 666; *State v. Gordon*, 138 Fla. 312, 189 So. 437); however, any indebtedness incurred where payment from taxes to be levied in the future is contemplated would seem to be within the constitutional provision. Obligations may be secured by pledges of income not derived from ad valorem taxation, so long as it is not necessary to levy taxes to obtain funds to replace such pledged funds.

"A scheme of financing which directly or indirectly obligates a taxing unit such as a county to pay a sum with interest extending over a period of years is in effect an attempt to create a binding, continuing interest-bearing obligation to pay money in the future, which violates the intent of the provision of §6, of article IX, of the constitution," regulating the issuance of bonds by counties, municipalities and local authorities (*Hollywood Inc. v. Broward County*, Fla., 90 So. 2d 47, text 51).

Although a municipal corporation may not, by reason of §10, Art. IX, State Const., issue certificates of indebtedness and use the proceeds thereof to purchase lands and erect a building thereon to rent to private persons, corporations or firms, for use in connection with a business operated for private profit and gain (*State v. North Miami*, Fla., 59 So. 2d 779), it is doubted that a building

rented for use as a postoffice would be within such rule.

From the above and foregoing question 1 must be answered in the negative. As to question 2 it must also be answered in the negative, in so far as it may be contemplated that taxes may be levied without a freeholders' election for the purpose of repaying such a loan; but where the rentals are sufficient to make such payments, or where cigarette taxes or like funds may be available, loans may be made depending entirely upon such funds for repayment. If any taxation be contemplated for repayment violation of the constitutional provision would exist, in the absence of a freeholders' election.

060-63—March 30, 1960

#### COUNTY SCHOOL BOARD

TRAVEL AND SUBSISTENCE OF VOLUSIA COUNTY SCHOOL BOARD MEMBERS—§230.201, F. S., 1959 AND CH. 59-941

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

#### QUESTIONS:

1. How many school board meetings per year may school board members in Volusia county attend and be paid mileage for said attendance?

2. May board members be paid mileage for attending official meetings only?

Section 230.201, F. S., was enacted in 1955 and amended by Ch. 57-249, a 1957 act. It provides:

*Compensation of members of county board.*—Each member of a county board shall be allowed from the county school fund of his county ten dollars per meeting and seven and one half cents per mile for every mile actually traveled in going to and from the county courthouse by the nearest practicable route, for participation in each regular and special meeting of the board; *provided, such allowance shall not be made for more than nine meetings in the first half and nine meetings in the second half of any one fiscal year in counties having a population of less than eighty thousand according to the last preceding state or federal census, nor for more than twelve meetings in the first half and twelve meetings in the second half of any one fiscal year in any other county; and provided, further, that this section shall not apply until January 1, 1951, to counties in which compensation is prescribed by special or local law, or by general law with stated population application. Subsistence and travel expense without the county when such travel is authorized by law or by regulations of the state board, shall be the same as the travel and subsistence allowance for employees of the state.* (Emphasis supplied.)

Chapter 59-941 provides:

Section 1. That the members of the board of public instruction in counties in the state of Florida having a population of not less than sixty-five thousand (65,000) and not more than eighty thousand (80,000) according to the last preceding federal census, shall each receive, as

compensation for official services rendered, the sum of two hundred (\$200.00) dollars per month, to be paid monthly from out of the county school fund of each of such counties, and in addition, each member shall receive seven and one-half ( $7\frac{1}{2}$ ) cents per mile for each mile actually traveled in the performance of their official duties as a board member; provided, that the payment of such compensation and mileage expense shall not in any way impair or lessen the participation of such counties in the state minimum foundation program fund.

Section 2. All laws and parts of laws in conflict herewith be, and the same are hereby repealed. (Emphasis supplied.)

It would appear that the 1959 act of the legislature must govern in counties included in the population brackets provided since it is the latest enactment of the legislature on the subject. Volusia county, according to the 1950 census, has a population of 74,229. It therefore is affected by Ch. 59-941.

Your questions are therefore answered as follows:

1. No legal limit is fixed by law on the number of official meetings of the school board of Volusia county which school board members may attend and be reimbursed for their mileage at  $7\frac{1}{2}$ ¢ per mile as provided by Ch. 59-941.

2. Chapter 59-941 provides for mileage to be paid school board members "... for each mile actually traveled in the performance of their official duties as a board member." By the terms of this act such travel is not limited solely to attendance of board meetings but also includes other travel on official duties of the board.

060-64—April 1, 1960

### COURT COSTS

CONSTRUCTION OF §58.10, F. S., COSTS REFUNDED TO COUNTIES BY STATE IN CERTAIN PROCEEDINGS RELATING TO STATE CONVICTS—§9, ART. XVI, STATE CONST., §§939.01, 939.02, 939.07 AND 939.15, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

What is the measure of the costs to be refunded, by the state to the county, under §58.10, F. S.?

Section 58.10, F. S., provides, in so far as here material, that "all lawful costs hereafter legally adjudicated against and paid by any county in all lunacy proceedings and all criminal prosecutions against state convicts imprisoned at the state prison at Raiford, and in all habeas corpus proceedings brought to test the legality of the imprisonment of state prisoners at the prison farm at Raiford, shall be refunded to the county paying the same . . ."

Section 58.10, F. S., refers to the costs of insolvent dependents mentioned in §9, Art. XVI, State Const., which provides that, "when the defendant is insolvent or discharged, the legal costs and expenses, including fees of officers, shall be paid by the county where the crime is committed . . ." Prior to its amendment in 1894 this section required such costs to be paid by the state, which at that time bore the costs and expenses of criminal prosecution. By the said 1894 amendment of said section the costs and expenses of



criminal trials were transferred from the state to the county; however, the counties were by the 1894 amendment given "all fines and forfeitures collected under the penal laws of the state" as a fund for the payment of such costs and expenses.

Section 939.01, F. S., provides that "in all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person," such costs including the costs accruing before the committing magistrate (§939.02, F. S.). Except "in all criminal cases prosecuted in the name of the state in the circuit courts or criminal courts of record in this state where the defendant is insolvent or discharged, the county shall pay the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases" (§939.07, F. S.). The county is also required to pay the costs on appeal of an insolvent defendant taking an appeal (§939.15, F. S.).

In short, the costs to be refunded under §58.10, F. S., are those costs which, except for the insolvency of the defendant, would have been assessed against him. Under these statutes the county pays the costs and expenses which would, except for his insolvency, be assessed against the convicted defendant under §§939.01 and 939.02, F. S. Such costs are discussed in Florida county commissioners manual, pp. 477 to 504, Florida sheriffs manual, pp. 91 to 93 and Florida clerks manual, pp. 319 and 320.

Section 58.10, F. S., also provides for refund of costs paid by the county in mental and physical incompetency proceedings incurred under §§394.22 and 394.23, F. S.

Applying the above formula to the information contained in the file submitted with your request, it appears that the reimbursement by the state to the county under the provisions of §58.10, F. S., would be limited to the following items:

|  |         |
|--|---------|
| Filing fee in state supreme court .....  | \$25.00 |
| Filing fee paid clerk circuit court, indictment for murder in the first degree—a state convict ..... | 15.00   |
| Filing fee paid clerk circuit court, writ of habeas corpus—a state convict .....                     | 10.00   |
| Total .....  | \$50.00 |

As to other items which appear in the file submitted with your inquiry, the invoice with county commissioners of Union county dated Feb. 1, 1960, requesting reimbursement of the county out of state funds includes an item in the amount of \$233.40 for payroll of state witnesses appearing before the court. This cost is not taxable to the defendants and therefore the county cannot be reimbursed (County commissioners manual, p. 497, note 326). Nor can the county be reimbursed for the other item designated as compensation for general court activities performed by the clerk of the circuit court for trial work in connection with trials of state convicts, in the amount of \$226.20. The cost of general court work under the formula set forth in this opinion is not taxable to the defendant, but is paid by the county. The fees of the clerk of the circuit court that are taxable to the defendant are included in the flat filing fee collected in connection with each case, and are not taxable or payable in addition to said flat fee.

Included in the itemized statement accompanying your request

are some fees which are not for general court work. Said fees are, however, included in the flat filing fee, as follows:

|  |       |
|--|-------|
| Filing witness subpoena praecipe .....       | .25   |
| ditto .....                                  | .25   |
| Issuing 5 witness subpoenas .....            | 5.00  |
| Minutes of the proceedings, writing of ..... | 25.00 |

Note: This charge should not include any page of the minutes which contain only the proceedings in any case for which a filing fee is paid.

|                            |      |
|----------------------------|------|
| Adm. oaths 18 at 50¢ ..... | 9.00 |
| Ditto 12 at 50¢ .....      | 6.00 |

Note: It is presumed that these oaths were administered to jurors and witnesses in specific cases.

|   |       |
|---|-------|
| Issuing 8 subpoenas at \$1.00 .....         | 8.00  |
| Indexing case 333 in 3 dockets at 15¢ ..... | .45   |
| Photo copies of informations .....          | 10.50 |

For purposes of reimbursement by the state the above is immaterial because under the provisions of §58.10, F. S., as interpreted herein, the state is required to refund to the county only those costs which may be assessed against an insolvent defendant which do not include costs of general court work or payments which the county may make improperly to the clerk of the circuit court for items included in the flat filing fee in connection with a particular case.

060-65—April 5, 1960

### TAXATION

#### EFFECT OF INVALIDATION OF §193.221, F. S., SEPARATE ASSESSMENTS OF MINERAL, OIL AND OTHER SUBSURFACE RIGHTS IN REAL PROPERTY—§193.40, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Section 193.221, F. S., providing for the separate assessment of mineral, oil and other subsurface rights in real property having been held unconstitutional and invalid by the supreme court, what action, if any, may be taken by the county taxing authorities in connection therewith, and what are the rights of taxpayers paying said taxes?

Section 193.221, F. S., which provided for the separate assessments of "mineral, oil and other subsurface rights in real property," setting out the procedure and limitations governing such assessments, having been held unconstitutional and invalid by the supreme court of Florida (*Cassady v. Consolidated Naval Stores Co.*, and *Green v. Consolidated Naval Stores Co.*, decided March 23, 1960, and yet unreported) the effect of that invalidation upon liens for delinquent taxes yet unpaid, upon the rights of those taxpayers who have paid said taxes assessed against them, and the status of unpaid current taxes, as well as what action should be taken as to 1960 taxes not yet made, is material to the county taxing officials.

Although the tax assessors may have made tentative entries for tax rolls, providing for the separate assessment and taxation of mineral, oil and other subsurface rights in real property, neither the final valuation of said interests nor the assessment has yet been

made. The statute having been invalidated the taxing officials have no further authority to make separate assessment of such rights, so preparations for 1960 assessments, the assessment having not been completed, are unauthorized and illegal, and should be deleted from the assessment roll. The assessment against the land should be revised so that a single assessment exists against the lands at their full cash value, as if no separate mineral interests existed.

Existing unpaid assessments upon the 1959 tax roll should be canceled and credit taken on the errors and insolvencies roll. The provisions of section 193.40, F. S., would seem applicable where 1959 taxes have been paid pursuant to such invalid assessments, as such payments constitute payments when no tax was due. This same section would seem applicable for the payment of assessments made on assessments made prior to 1959, unless barred by some statute of limitation.

Outstanding tax sale certificates issued pursuant to assessments made under said §193.221 for years prior to 1959 would be invalid because of the invalid assessment pursuant to said section. Certificates in the hands of the counties, issued pursuant to assessments made under said §193.221, should be canceled as invalid assessments in the usual manner.

The above observations seem to answer your above stated question as well as the same may be answered generally.

060-66—April 5, 1960

#### LICENSES

REGULATORY LICENSE DISTINGUISHED FROM REVENUE PRODUCING LICENSE—CONSTRUCTION OF PROVISIO IN

§2, CH. 59-803—§§205.31 AND 616.18; CH. 205, F. S.;

ART. II, STATE CONST.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee*

#### QUESTION:

What is meant by "any department of this state" within the proviso of §2, Ch. 59-803, and similar statutes?

Chapter 59-803, provides a comprehensive scheme for the licensing of persons peddling merchandise, articles or service in counties having a population between 55,000 and 70,000 inhabitants according to the latest official state-wide census, such licenses to be issued by the boards of county commissioners of such counties. Bona fide resident freeholders of the county are exempted from the said statute (§1 of said act). All applicants for license are required to submit with their applications for license "a recent photograph of himself, specimens of his fingerprints, which the sheriffs' offices of this state shall furnish, and a fee" as provided in said act. (§4 of said act). Licenses may be issued, by the county commissioners, "to each person of good moral character making application" (§5 of said act). Applications for licenses must be made in person (§6 of said act). The license fee prescribed by §7 of the act is designed as "a fee to defray the expense of the said board's investigation" (§3 of the act). A reading of the entire chapter as a whole leads to the conclusion that the license required is a regulatory license and not a revenue license. The regulatory license required under said

Ch. 59-803 is not in lieu of revenue licenses required by other statutes, such as Ch. 205, F. S.

Section 2 of said Ch. 59-803 contains a proviso that no license under said chapter "shall be required of any person holding a valid and lawful license issued by any *department of this state*." Chapter 59-803, being a regulatory license, and not a revenue license, designed to protect the buying public from unreliable persons and fraud and deceit, the reference to licenses issued by any department of this state doubtless is a reference to regulatory and not revenue licenses. The powers of the state are divided into the executive, the legislative and the judicial departments (Art. II, State Const.). These departments function through officers, boards, commissions, agencies, etc., provided by the constitution itself or by the legislature.

In *State v. Lee*, 150 Fla. 35, 7 So. 2d 110, text 114, the court stated that it was its "conclusion that the Florida Citrus Commission is a *department of the state government* and each member thereof an official of the state." In *Glendinning v. Curry*, 153 Fla. 398, 14 So. 2d 794, text 802, it is stated that "generally speaking, the word 'department' connotes a branch or division of governmental administration." The state tuberculosis board (*Kennard v. State Tuberculosis Bd.*, 129 Fla. 619, 176 So. 872, text 875), the State Bd. of Education (*Hampton v. State Bd. of Education*, 90 Fla. 88, 105 So. 323) and the state road department (*Davis v. Love*, 99 Fla. 333, 126 So. 374, text 378) were treated by the court as agencies or departments under one of the constitutional departments of the state. The reference in said §2 of Ch. 59-803, is to similar agencies, boards, departments, officers, etc., acting under one of the three constitutional departments of government.

The permit required before circuses, traveling shows, tent shows, etc., as a condition to showing in a county, formerly issued by the state comptroller (former §205.31, F. S.) but now issued by the department of agriculture (§616.18, F. S.) may be given as an example of a regulatory license or permit issued by a department of this state.

From the above and foregoing we come to the conclusion that the reference to "any person holding a valid and lawful license issued by any department of this state," has reference to regulatory, but not occupational licenses, such as those issued under Ch. 205, F. S., by some officer, department, board, commission, or agency of the state, under legislative authority, authorizing a person to follow the occupation of peddling within the state, or any part thereof. Permits or regulatory licenses such as those required by said Ch. 59-803, are not in lieu of occupational licenses required under Ch. 205, F. S., and like and similar laws, and both may be required.

060-67—April 5, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT UNDER CH. 122, F. S.—OFFICERS AND EMPLOYEES OF CIVIL DEFENSE DEPARTMENT AS MEMBERS—CHS. 122 AND 152; §§122.02, 252.02; 252.04 AND 252.09, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

**Are officers and employees of the department of civil**



defense (§252.04) and the local civil defense organizations, state or county officers and employees within the purview of Ch. 122, F. S.?

"State and county officers and employees," within the state and county officers and employees retirement system (Ch. 122, F. S.), "include all *full-time officers* or employees who receive compensation for services rendered from state or county funds . . . or from funds of any state institution or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries . . ." (§122.02(1), F. S.) (Emphasis supplied.)

The purpose of Ch. 252, F. S., was "to create a state civil defense agency, and to authorize the creation of local organizations for civil defense in the political subdivisions of the state" (§252.02 (1) (a), F. S.). Said Ch. 252 establishes a state agency, known as the department of civil defense (§252.04). "Each county of this state is," by §252.09, F. S., "authorized and directed to establish a county civil defense council and organization for civil defense in accordance with the state civil defense plan and program . . . . Any incorporated city or town may organize a local civil defense council to assist the county and state civil defense councils." (§252.09). Political subdivisions are empowered to "appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes . . . . To appoint, employ, remove, or provide, with or without compensation, air-raid wardens, rescue teams, auxiliary fire and police personnel, and other civil-defense workers." (§252.09).

The director of civil defense "may employ such technical, clerical, stenographic and other personnel, and fix their compensation when they are to be compensated, and may make such expenditures within the appropriation therefor, or from other funds made available to him for purposes of civil defense . . ." (§252.04). Persons, firms and corporations may offer to the state or any political subdivision thereof, services, equipment, supplies, material or funds by way of gift, grant, or loan for purposes of civil defense. (§252.19).

The above question is answered in the affirmative in so far as it relates to officers and employees of the state and county agencies, although they may be paid from funds donated to the said state or county agency, in which case they become either state or county funds.

060-68—April 5, 1960

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS EXPENSES—COUNTY AND DISTRICT OFFICERS AND EMPLOYEES—CHS. 129 AND 145; §§80.49, 112.061, 129.02 AND 145.02, F. S.**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Are the county, the county officers, and districts

and their officers, authorized to reimburse their officers and employees any per diem and travel expenses incurred in the performance of their duties?

2. If question 1 is answered in the affirmative, how should the reimbursements be determined as to amount?

Boards of county commissioners have only statutory powers (Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d 638) and where there is doubt as to the existence of a power it should not be assumed (Gessner v. Del-Air Corp., 154 Fla. 829, 17 So. 2d 522). The same rule applies generally to districts (Halifax Drainage Dist. v. State, 134 Fla. 471, 185 So. 123, text 129; 28 C. J. S. 258, §12). The source of such power is derived from acts and statutes of the legislature (62 C. J. S. 235, §107). The fact that the counties, their officers, districts and their officers, are authorized to exercise their functions by and through agents and employees, evidences an intention, on the part of the legislature, to pay them compensation. County officers, including the clerk of the circuit court, tax assessor, tax collector, and other officers, within the purview of Ch. 145, F. S., may deduct, from the gross income of their offices "all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of" their offices (§145.02, F. S.).

Under Ch. 129, F. S., the county commissioners are required to budget county funds, as directed by §129.02, which budgets, when adopted, become an appropriation binding upon the county commissioners and the county. Provision must be made in this county budget for payment of the compensation of county employees and agents payable from county funds. This same rule applies to county special districts under the jurisdiction of the board of county commissioners (§129.02(6), F. S.). Tax assessors and tax collectors of the several counties of the state are required to prepare office budgets and submit them to the state comptroller for approval, and when such budgets receive approval of the state comptroller they become appropriations for the operations of such offices and control the expenditures of said offices.

Sheriffs are likewise required to submit office budgets to the board of county commissioners for the operation of their offices, which budgets, upon becoming final, become operating budgets of the sheriff's office and must be complied with. (30.49, F. S.). These budgets doubtless may contain appropriations for "all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office." (See §145.02, above). The county and office budgets above discussed may be likened to legislative appropriations made by the legislature for general legislative expenses, (Adams v. Lott, 112 Fla. 489, 150 So. 596, text 597) and binding on the county, districts and officers, within the operation and purview of such budgets, in like manner as are legislative budgets.

For an officer or employee of the county or district to be entitled to his per diem and mileage in the performance of his duties and obligations, such per diem and mileage must have been incurred as "necessary expenditures for the proper operation of said office." Only those *necessary expenditures* so incurred may be refunded. In addition to the requirement that such expenditures be "necessary expenditures for the proper operation of said office"

there must be funds available therefor and properly budgeted where office budgets are required. We gather from a study of the opinion in *Adams v. Lott*, supra, that the expenses incurred in that case would not have been paid had there not been made available funds for such payment in the county budget. The phrase "necessary expenditures" seems to extend "to such expenses as are clearly incident to the execution of the power granted, or which necessarily arises in the fulfilment of the duties imposed by law." (28 Words and Phrases, 256-276).

These observations lead to an affirmative answer to question 1, so long as funds are available by budget duly adopted or otherwise, and so long as such expenditures are "necessary expenditures" within the above definition.

Theoretically, the "necessary expenditures" incurred by public officers and employees in the operation of their offices and the exercise of their employment, would be the actual expenditures in dollars and cents; however, an attempt to follow this rule is fraught with difficulties when an attempt is made to follow this rule. For example, any attempt to ascertain the *actual cost* to an owner of a motor vehicle when traveling a stated number of miles would be next to an impossible task, while the actual cost of meals and lodging might easily be ascertained. Only those expenses necessarily incurred are payable; if payments in excess of the *necessary expenditures* are made, the same become not a reimbursement but an unlawful gift or donation. To pay two persons for the same mileage traveled by a single automobile would, as to one of the parties, be a gift or donation and not a reimbursement of necessary expenditures.

We feel that it would be within the law for a county, district or officer to, after actual research and experience, to determine and adopt a substantially correct average expenditure to be adopted and approved for use in lieu of actual expenditures and costs. Such has been done by the legislature as to state officers and employees by §112.061, F. S. Similar provision has been made for some counties, at least as to certain officers and personnel, by special legislative enactment. Any such adoption of a fixed per diem and mileage, in lieu of actual per diem and mileage, by a county, district or officer should be with the approval and consent of the state auditing department, otherwise said department will not be bound thereby in auditing offices affected thereby.

Any such county, district or officer may, and probably should, require the use of public transportation in lieu of private transportation when the former is less expensive to the county, district or office.

The last above two paragraphs hereof seem to furnish the answer to question 2 as well as answers may be formed under the information now before us.

060-69—April 5, 1960

#### WEAPONS AND FIREARMS

DISPOSITION OF CONFISCATED WEAPONS BY CITY OF MIAMI POLICE OFFICIALS—CH. 57-1785; §790.08(2), F. S.

To: Mark W. Lance, State Adjutant General, St. Augustine  
QUESTION:

Does Ch. 57-1585 (senate bill 1340) supersede the

provisions of §790.08(2), F. S., and, if so, is the city of Miami still required to turn over to the state adjutant general all weapons or small arms confiscated through criminal proceedings?

It is a well established rule of statutory construction that a later special act of the legislature will control where it is in direct conflict or there is an irreconcilable repugnancy with a prior general law (In Re Adam's Guardianship, Fla., 99 So. 2d 723; Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211). It is also a well established rule of statutory construction that all acts of the legislature be read in *pari materia* where at all possible (Ellis v. City of Winter Haven, Fla., 60 So. 2d 620; State ex rel McClure v. Sullivan, Fla., 43 So. 2d 438, Arnold v. State ex rel Mallison, 147 Fla. 324, 2 So. 2d 874; American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524).

It is significant to note that Ch. 57-1585 provides in part:  
*... nor shall this Act apply to pistols, revolvers, knives, slingshots, dirks, or other property of like character, the possession of which is made unlawful, but all such unlawful property may be summarily destroyed by said City.* (Emphasis supplied.)

It would appear from reading the above quoted provision of the local act applicable to the city of Miami that pistols, etc., should not be disposed of at public sale for storage costs but where it is deemed advisable, in the discretion of appropriate municipal officials, said weapons may be destroyed.

Reading the local act in *pari materia* with the general law it would appear then that all firearms described in the law which are not summarily destroyed by the city should be forwarded to the state adjutant general for appropriate disposition under the terms of §790.08, F. S.

Your question is answered accordingly.

060-70—April 5, 1960

#### PROBATE LAW

RESIDENT DECEDENTS—PROBATE IN OTHER STATES—  
 INTANGIBLE PERSONAL PROPERTY—§732.26, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Should an *ad valorem* tax assessment against intangible personal property of a person domiciled in this state at the time of death, made after the death of such person, be cancelled where there has been no probate of the last will and testament of such person, in accordance with §732.26, F. S.?

This question arises by reason of §732.26, F. S., which, in so far as here material, provides that:

The will of any person who heretofore has died a resident of the state or any person who hereafter dies a resident of the state must be admitted to probate in an original proceeding in the state in order to establish its validity. Until so admitted to probate, such will shall be ineffective to convey title to, or the right to possession of real or personal property of the testator; and, until such probate



proceedings have been had, no personal representative shall acquire title to, or the right to possession of, any personal property owned by the decedent at the time of his death, notwithstanding that probate or administration proceedings have been had in some other state or country . . . . The title to personal property wheresoever situate of a person who hereafter dies a resident of the state *shall not pass under his will to the legatee or legatees named or designated therein* until after such personal property has been administered upon and distributed by the domiciliary personal representative of his estate; provided that this section shall not apply to any property as to which a valid order has been entered that no administration is necessary as to such property or as to the estate of which such property is a part.

"In contemplation of law, intangible personal property accompanies the person of the owner and is taxable at his domicile, unless it has acquired a business situs for taxation purposes elsewhere" (State v. Gay, Fla., 35 So. 2d 403, text 408; see also State v. Gay, Fla., 46 So. 2d 165, text 167; 51 Am. Jur. 474, et seq. §§463, et seq. 84 C. J. S. 229-238, §116). It has been stated that "a state has the power to tax such property where the owner is domiciled in the state, even though the property has no physical location within the state or may be said to be located elsewhere" (84 C. J. S. 230, §116, notes 23 and 24). Generally, intangible movables "are regarded as situated at the domicile of the owner," (15 C. J. S. 928, §18). "For the purposes of inheritance or succession taxes, it is now settled that intangibles have only one situs, which is at the domicile of the decedent at the time of his death." (15 C. J. S. 929, §18). Under the fiction of law that movables follow the person of the owner irrespective of their actual situs, the general rule is "that the succession to, and the disposition of, personal property in case of intestacy is determined, unless local statutes otherwise provide, by the law of the domicile of the intestate at the time of his death without regard to actual situs of the property or place where the owner died." (15 C. J. S. 925, §18; see also 29A C. J. S. 524, §5). It seems evident that the intangible personal property of the resident decedent, mentioned in the above stated question, had its situs in Florida at the time of the said decedent's death.

"As shares of stock are intangible, incorporeal, personal property, for some purposes they can have no fixed situs of their own, but have a situs either at the domicile of the holder, as being in the nature of a chose in action, or at the domicile of the corporation, as representing a part of the corporate property; and it is immaterial, in determining such situs, where the certificate of stock may physically be, since it is merely evidence of title to the stock" (18 C. J. S. 624, §194). "A stock certificate is not stock in the corporation, but is merely evidence of the holder's interest in the corporation, his ownership of the shares represented thereby, and his rights and liabilities resulting from such ownership. It is authentic evidence of the title to the stock." (13 Am. Jur. 397-398, §319). The general rule appears to be well settled that, regardless of the place where the certificate of stock may be, the situs of the stock represented by it is either at the domicile of the owner or the location of the corporation issuing it, and not where the cer-

tificates of stock may be (21 Am. Jur. 403, §52; 13 Am. Jur. 300, §174; Annotation in 72 A. L. R. 179-186).

"The general rule that original jurisdiction to probate the will of a decedent is possessed by the appropriate court at the testator's domicile (see 57 Am. Jur. 523, §766) is one so firmly rooted as to tend in itself to suggest the question whether a will may be admitted to probate in any other jurisdiction before being proved at the domicile." (Annotation in 119 A. L. R. 491). It appears from this annotation that the authorities are in conflict on this question, where there are assets within the jurisdiction of the court. Some cases seem to hold that personal property brought into a jurisdiction after the death of the testator will not give this jurisdiction (Annotation in 119 A. L. R. 506 and 507).

From the above and foregoing, it appears that a share of capital stock in a corporation represents the interest or right of the owner in the management of the corporation, in its surplus profits, and, on dissolution, in the balance of its assets after payment of debts. Such a share of corporate stock is a species of incorporeal property, personal in nature, regardless of the nature of the property owned by the corporation, and analogous to, and in the nature of, a chose in action. Such shares of stock are usually held to have their own situs either at the domicile of their owner or the location of the corporation issuing same. For some purposes the situs of the stock has been held to be the domicile of the owner, but for other purposes, such as attachment, garnishment, execution, etc., to be that of the corporation issuing such stock.

Section 732.26, F. S., quoted from above, seems to deem the situs of the personal property of decedents, having their domicile in Florida, and especially intangible personal property, to be with the domicile of the decedent at the time of his death. The domicile of the decedent, being in Florida at the time of his death, §732.26, F. S., if constitutional (and this office does not pass upon constitutional questions but leaves them to the courts) seems to be an encumbrance on the title to the property of resident decedents until and unless the estate of the decedent is administered under the laws of this state. Said §732.26 prevents the passing of title of the resident decedent's property, having its situs in this state, unless and until his estate is probated in this state. If the corporate stock of a resident decedent, without regard to the location of the stock certificates, had its situs in Florida at the time of the decedent's death, the said statute declares that title to such stock "shall not pass under his (the decedent's) will to the legatee or legatees named or designated therein until after such personal property has been administered upon and distributed by the domiciliary personal representative of his estate." This is a direct limitation, upon the passing of a resident decedent's personal property, including intangibles having their situs in this state, under his will unless and until that will receives domiciliary probate in the state of domicile—that is, in Florida. This section of the statutes appears to have been designed as a limitation upon the passing of title to property, real and personal, tangible and intangible, under the will of a person domiciled in Florida at the time of his death, until such will shall have been duly probated in Florida.

Said §732.26, if constitutional and valid, is, under §1, Art. IV, Fed. Const., entitled to full faith and credit in the courts of every

other state of the union. This constitutional provision has been held to be applicable to the legislative acts and statutes of the several states of the union (Annotation in 74 A. L. R. 711, et seq., and 100 A. L. R. 1143, et seq.); "hence, if a court of one state refuses to enforce the statute of another state in a case in which it ought to do so and in which the statute gives a right, it thereby denies the full faith and credit demanded by the Federal Constitution, because the statute is a public act of another state. Furthermore, the duty imposed upon courts to give full faith and credit to the constitution of a state as a public act of the state is as obligatory as the similar duty with respect to judicial proceedings of such a state." (12 Am. Jur. 378, §702). "The full faith and credit clause of the Federal Constitution prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting. Federal courts are bound equally with the state courts to observe the command of the full faith and credit clause where it is applicable. The constitutional provision as to full faith and credit by its terms excludes from the operation among the states a considerable portion of private international law. It gives full faith and credit, not only to judicial proceedings of every state, but also to its public acts and records." (12 Am. Jur. 379, §705).

Although there seems to be some conflict as to the applicable law in the construction of wills, "it may better be said that the rule which refers the will to the law of the state or country in which the testator was domiciled at the time of his death, rather than that of the state or country in which he was domiciled at the time of the execution of the will." (11 Am. Jur. 481, §174). Section 732.26, F. S., prohibited vesture of title under a will, of a decedent residing in this state and having his domicile therein, unless and until such will receives probate in the courts of this state. Florida probate is made a condition to transfer under will of decedents domiciled in this state at the time of their death. In other words, under said §732.26, a bequest of property owned by a resident domiciled in this state at the time of his death, until such will is admitted to probate in this state "such will shall not be effective to convey title to, or the right of possession of, real or personal property of the testator," even to the personal representative himself (§732.26, F. S.).

It may well be argued that under said §732.26, the will, in order to be valid as to intangible personal property, having its situs in Florida by reason of the domicile of the testator being in this state, must not only be executed and witnessed as required by the statutes, but must also be probated in Florida in order to give it validity as a will. This rule seems to be applicable only to property having its situs in this state. Intangibles, including corporate stock, have their situs, for purposes of ownership, at the domicile of their owner. Section 732.26 appears to be applicable to intangible personal property, including stocks and bonds, owned by a decedent domiciled in this state at the time of his death, and on its face invalidates the will as a transfer instrument unless and until probated in this state, as to such property having a situs in this state. Until the will is probated in this state, the property vests otherwise than in the personal representative.

Section 732.26, F. S., if constitutional and valid (which question this office leaves to the courts), operates upon the will as a transfer document, and invalidates the will as such unless and until probated in Florida, and is binding upon courts in other states and should be followed there, under the requirements of the full faith and credit clause of the federal constitution. Therefore, you are advised to refrain from canceling such a tax assessment unless and until the above §732.26 is construed by some court of competent jurisdiction.

060-71—April 5, 1960

#### SCHOOL CODE

#### PURCHASES BY BOARD—EFFECTS OF PROVISIO ON LOW BID—§237.02(2), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### QUESTION:

Can a school board refuse to award a bid to the low bidder for the purchase of goods and merchandise payable by the 10th of the month following delivery and receipt of the merchandise, where there is attached to the low bid the proviso that upon failure to pay the purchase price by the 10th of the month following receipt of the merchandise there is to be added to the low bid purchase price a service charge of 1% per month of the unpaid balance of the purchase price?

Section 237.02(2), F. S., provides:

(2) BIDS.—Bids shall be requested from three or more sources by the county board for any authorized purchase costing more than three hundred dollars. The county board shall have the authority to reject any or all bids and request new bids. In the acceptance of bids, the county board shall accept the lowest and best bid.

This act authorizes the board to exercise its discretion in determining which bid is "lowest and best."

In my opinion if the board should determine that the proviso inserted in the bid requiring a penalty for failure to pay by the 10th of the month following receipt of the goods is an unreasonable restriction or would work an undue hardship on the board, it could properly act within its discretion in rejecting the bid.

Your question is therefore answered in the affirmative.

060-72—April 5, 1960

#### STATE COMPTROLLER

#### DUTIES, POWERS AND AUTHORITY AS PREAUDITOR—§23, ART. IV, STATE CONST.; §§17.03, 17.05, 17.06, 122.061, 27.14 AND 27.15, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

What are the powers, duties, authority and obligations of the state comptroller, under §23, Art. IV, State Const., when auditing claims of officers and employees of the state and its agencies for refunds of travel and



### subsistence expenses and other claims?

Section 23, Art. IV, State Const., makes it the duty of the state comptroller to "examine, audit, adjust and settle the accounts of all officers of the state," thereby conferring upon said comptroller "the right and imposes upon him the duty to see to it that all disbursements of public moneys are authorized by a legal appropriation, and that the payment of a particular item violates no positive prohibition against payment, expressly or impliedly forbidden by law." (State v. Lee, 150 Fla. 35, 7 So. 2d 110, text 113). The imposition of these duties makes the comptroller more than a mere administrative officer (State v. Cone, 130 Fla. 158, 177 So. 854, text 856). "Under constitutional provisions creating the office of auditor (such as §23, Art. IV, above) without defining his duties, the duties of the state auditor are those pertaining to the office of public officer at common law" (Hicks v. Davis, 100 Kan. 4, 163 P. 799). The term "audit" is used "in the sense of inquiring into, hearing evidence upon, adjusting, correcting, and settling details, determining the correctness of charges made . . ." (7 C. J. S. 1275, note 30). The term implies the auditor's knowledge of the audited claim and its presentation to him for audit, its examination, and the consideration of the facts relative thereto, by him (Rio Grande County v. Bloom, 14 Colo. App. 187, 59 P. 417, text 419). Section 17.03, F. S., appears to be declaratory of said §23, Art. IV, State Const. The fact that a statute requires the comptroller to pay and issue a warrant for a claim approved by another, will not deprive the comptroller of his rights, duties and obligation under said §23, Art. IV, State Const. (Ex parte Powell, 70 Fla. 363, 70 So. 392, text 397). It is the duty of the comptroller to delete improper items from accounts audited by him (§17.06, F. S.).

"The comptroller of this state may demand and require full answers on oath from any and every person, party or privy to any account, claim or demand against or by the state, such as it may be his official duty to examine into, and which answers he may require to be in writing and to be sworn to before himself or before any judicial officer, or justice of the peace, or clerk of any court of the state, so as to enable such comptroller to decide as to the justice or legality of such account, claim or demand." (§17.05, F. S.). Items disallowed by such an audit should be deleted from the account (§17.06, F. S.). The payment of items or parts of items included in a claim, which are not proper claims against the state, would be violative of said constitutional and statutory provisions. Their correctness must be demonstrated to the comptroller before he may approve and pay them. As to claims for expenses and subsistence, made pursuant to §112.061, F. S., it is the duty of the claimant to satisfy the comptroller that such claims were validly and correctly incurred and that the amount claimed is the correct amount. Proof, satisfactory to the comptroller, may be demanded by him as a condition to payment. The claimant should produce evidence that the claim was incurred in connection with the exercise of his duties imposed upon him relative to his office or employment. No statute may deprive the comptroller of his powers, duties and obligations imposed under §23, Art. IV, State Const.

The requirements of said §23, Art. IV, are probably minimum requirements, so that the legislature may add additional require-

ments as to particular, or maybe all, claims presented to him for payment. The requirements of the constitution are always present and must be complied with. For example, a state attorney assigned by the governor under §27.15 must have his claim approved by the governor as a condition to payment; however, a state attorney assigned under §27.14 is not required by the statute to obtain a like approval by the governor, but in this case satisfactory evidence of the propriety of the claim must be presented to the comptroller. An affidavit may be accepted by the comptroller at his discretion. The guiding star to be followed by the comptroller is that he be satisfied as to the propriety and correctness of the claim; however, no undue burden should be imposed upon claimants by the comptroller. The comptroller is the judge of what evidence he requires to convince him of the correctness and propriety of claims; however, there should be no abuse of this right. Although the governor's approval should be required of claims arising by reason of assignments under §27.15, F. S., such approval is not so required when the assignment was made under §27.14, but this does not dispense with the requirement that the comptroller be furnished with proof of such claim satisfactory to him.

The above observations seem to answer the above question as well as it may here be answered.

060-73—April 6, 1960

**GAME AND FRESH WATER FISH COMMISSION  
FEES AND MILEAGE CHARGED — CONSTRUCTION OF  
§372.72, F. S., PROVIDING FOR DISPOSITION OF FINES,  
PENALTIES AND FORFEITURES — §14, DR, STATE  
CONST.; §§30.23 AND 924.01, F. S.**

To: O. E. Frye, Jr., Assistant Director, Game and Fresh Water  
Fish Commission, Tallahassee

**QUESTION:**

What fees and mileage are payable to the game and fresh water fish commission, and its conservation officers, pursuant to §372.72, F. S., and what disposition is to be made of such fees and mileage?

Section 372.72, F. S., in so far as here material, provides that "the game and fresh water fish commission and its conservation officers shall be allowed for making arrests the same fees as sheriffs, and the same mileage for conveying prisoners, the same to be taxed as costs in the cause, *in case of conviction*, and paid in like manner as the compensation of sheriffs, but no fees or mileage shall be allowed in case of acquittal. All mileage and other fees received by the game and fresh water fish commission, or any of its conservation officers under this section, shall be deposited in the state treasury to the credit of the state game fund."

The phrase "*in case of conviction*" doubtless was used in the same sense as in §14 of the Florida declaration of rights, which provides that "no person shall be compelled to pay costs except after *conviction, on a final trial*." The supreme court of Florida, in *Weathers v. State*, Fla. 56 So. 2d 536, text 538, stated that "our present thought is that one is convicted when the jury returns a verdict of guilty and the judge clinches the finding by adjudicating the guilt though the prisoner may never be punished. How can it be logically said that a man is innocent because he has never been pun-

ished? The finding by jury and adjudication by court settles the fact of guilt; the punishment when meted out is simply the penalty for established misconduct." See also *Smith v. State*, 75 Fla. 468, 78 So. 530, text 532; *Timmons v. State*, 97 Fla. 23, 119 So. 393, text 394; *Owens v. Barnes*, 24 Fla. 153, 4 So. 560, text 562; 9 Fla. Jur. 18, section 9; Annotations in 36 A. L. R. 2d 1238-1241; 113 A. L. R. 1179-1185; 90 A. L. R. 1111-1124; and 24 A. L. R. 1290-1293. (Emphasis supplied.)

The phrase "*conviction on final trial*" in §14 of the Florida declaration of rights, refers to the court having original trial jurisdiction, and did not include a writ of error to an appellate court (*Davis v. Newman*, 24 Fla. 33, 3 So. 467, text 470). Since this case was decided the method of review of criminal cases has been changed so that they are now reviewed by an appeal instead of by writ of error. Under an appeal, as distinguished from a writ of error, the cause is transferred from the trial court to the appellate court as a stem in the proceeding, which was not the case with writs of error, now abolished (A. G. O. 060-45, dated March 8, 1960). There has not been a final conviction so long as the appeal is pending. Under §372.72, F. S., the commission and its conservation officers are entitled to the fees and mileage mentioned in said section only "in case of conviction." Since the advent of *appeals* in criminal cases, instead of writs of error (§924.01, F. S.), we doubt that there has been a final conviction pending an appeal. In any event should there be a reversal of the case and the defendant was discharged with or without a retrial, there would be no conviction within the purview of §372.72, so that if the fees and mileage had been paid the commission would have to refund the same. We hold, therefore, that fees and mileage under §372.72, F. S., are due and payable to the commission when the judgment becomes final, either by affirmation on appeal or upon the payment of the fine or the commencement of imprisonment under sentence. In any case where an appeal is filed no settlement should be made until the appeal is disposed of.

Only in those cases where an arrested prisoner is carried before a committing magistrate or to the sheriff's office, or delivered to another officer, will there be any mileage due and then only to the extent traveled. There may be no payment for *constructive mileage*. The applicable fees are those set out in §30.23, F. S., which section is applicable here notwithstanding sheriffs are now paid a salary. The fees and mileage paid for arrests by conservation officers belong to the commission and not such officers and must be delivered to the commission and by it paid into the state treasury in the usual manner.

The following former opinions of this office have been examined in connection herewith: Oct. 10, 1929 (1929-30 A. G. O. 204), May 18, 1932 (1930-33 A. G. O. 432), July 8, 1942 (1941-42 A. G. O. 482), March 23, 1943 (1943-44 A. G. O. 332), Dec. 11, 1946 (1945-46 A. G. O. 511) and May 25, 1950 (1949-50 A. G. O. 404).

These observations seem to answer the above question.

060-74—April 6, 1960

**REGULATION VOCATIONS AND PROFESSIONS  
SCHOOLS FOR BEAUTICIANS AND BARBERS, HOUSING  
AND EQUIPMENT—§§477.27(7) AND 476.24(6); CHS.  
476 AND 477, F. S.**

To: *Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture, Tallahassee*

**QUESTION:**

**Can a school be held for beauticians in the day time  
and for barbers at night in the same room and using the  
same equipment?**

I do not find any prohibition in either Ch. 477, F. S., relating to schools of beauty culture, or Ch. 476, F. S., relating to schools for barbers, that would prevent such an arrangement as indicated by your question. Section 477.27(7), F. S., which prohibits the use of any room or place for beauty culture which is also used for residential or business purposes, unless a partition of ceiling height is erected, appears to relate only to "beauty shops" rather than to "schools of beauty culture." Practically the same provision is contained in §476.24(6), relating to barber shops.

However, it would be necessary that the facilities meet the requirements of both laws and all lawful rules and regulations adopted by the respective boards.

Your question is answered accordingly.

060-75—April 11, 1960

**TAXATION  
LICENSING OF COMMUNITY ANTENNA SERVICE UNDER  
CH. 205, F. S.; §205.53, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Is a community television antenna service operated  
in this state a business subject to taxation under Ch.  
205, F. S., or other state law?**

Community television service is designed to make available better television reception, and usually consists of a large master antenna located on a hill or high tower to which is connected a wire or cable system, installed with special amplifying equipment incorporated to maintain necessary strength of the television signal. Such wire or cable system leads, on poles or underground conduits, to areas where persons, firms or corporations desire the antenna service to be located. To these wires or cables are attached open and lead lines to individual residences and other locations where the antenna service is desired. To these open end lead lines, the subscribers attach conventional television receiving sets to effect the television reception of signals delivered by the master antenna system. For the privilege of connecting to this master antenna system, subscribers are billed for installation and monthly service charges. Little distinction may be made in technical effect between the master antenna system and a conventional single antenna. Both the master antenna and the conventional antenna gather radio or television waves or impulses and deliver them to the television receiving set.



Comparison may be made between the master antenna system, and the antenna system maintained by telephone and telegraph companies of modern times, where radio or other electrical impulses are received on an antenna tower, located at or near telephone exchanges or telegraph offices, which gather radio or electronic waves, from a sending station, and process them and connect them to subscribers' telephones or telegraph receiving sets, by the use of wires or cables. The electronic processes used in television, telephone and telegraph, as above described, are substantially the same. In the case of the telephone and telegraph systems described, as well as the use of the master antenna system, sending stations translate sound and sight waves or impulses into electronic waves or impulses and send the same into the ether or space, such waves or impulses traveling through the ether or space being capable of capture by antennas and television receiving sets.

Master antenna sets, as well as conventional antennas, capture these electronic waves or impulses and channel them through leadin wires and cables, to conventional television receiving sets where they are converted back into sound and sight waves, alike to those processed by the sending station. The master antenna here considered is a facility for hire to customers. The master antenna system is not designed to send radio or television waves or impulses; only to receive the same. No person, in another state, or even in the same locality with the master antenna system, may receive messages or pictures by reason of the said system unless and until directly connected therewith. Master antenna sets are in effect attachments to television receiving sets which enable such sets disadvantageously located to operate like sets advantageously located. Persons maintaining such master antenna sets, and renting or leasing the services thereof to television set owners, are in effect renting antenna service. The business operated is a local antenna service for the public, although the radio or television waves or impulses collected and transmitted to television receiving sets may have moved interstate. The business of furnishing master antenna service to television set owners is a public service, and not the transmission of radio and television programs as is the case of a television sending station. There would seem to be little, if any, practical difference between renting the services of a master antenna set to television set owners and the renting of separate conventional television antennas to the same television set owners, although the two businesses may fall under different sections of our occupational licensing statutes.

We, therefore, reach the conclusion that the operation of master antenna systems, where the rental of the services of such systems are confined within a single state, is not engaging in interstate commerce, but is intrastate commerce, and that the business of renting master antenna system services is the operation of a business within the purview of Ch. 205, F. S. Such service appears to be more of a public service than the rental of tangible personal property.

We are, therefore, of the opinion that such businesses should be licensed under §205.53, F. S.

060-76—April 11, 1960

# CRIMES

## LOTTERIES. ELEMENTS — "COME-AWAY-WITH-A-COMET SWEEPSTAKES" AS CONSTITUTING

To: *E. Wilson Purdy, Chief of Police, St. Petersburg*

### QUESTION:

Does the "Come-Away-With-a-Comet Sweepstakes," conducted in the manner hereinafter set forth, constitute a lottery?

### STATEMENT OF FACT:

An entry must be submitted on an official entry card which can be obtained only at the place of business of a Comet automobile dealer and which is not transferable. The entry card is filled out and mailed in accordance with the instructions thereon. Fifty Comet automobiles are to be awarded to the entrants on the basis of a blindfold drawing. One of said automobiles is to be delivered to each winning contestant free of all charges except taxes. Any winner who has purchased a new Comet from an authorized Comet dealer after March 16, 1960, but no later than March 31, 1960, will be refunded the full purchase price paid for the same upon presentation of a certified bill of sale.

There are three elements in a lottery, viz., prize, award by chance, and consideration.

It is apparent that the give-away program outlined above includes the elements of prize and award by chance.

I think that the element of consideration is also present. Participants expend time and travel expense and suffer inconvenience in going to the place of business of a Comet dealer to obtain entry cards. Also, persons who go to such a place of business for the purpose of procuring entry cards are made aware of the automobiles and accessories which are there offered for sale and some of them doubtless make purchases, then or later, and thereby enhance the dealer's profits. Further, the participants place their names and addresses on the entry cards used by them, with the result that a ready mailing list of potential customers is made available for the use of the dealer.

It is my opinion that said sweepstakes contain the three essential elements of a lottery and that it is a lottery. Therefore, your question is answered in the affirmative.

060-77—April 15, 1960

## COUNTY ORGANIZATIONS, OFFICERS AND REGULATIONS COUNTY COMMISSIONERS AND CLERK AS EX OFFICIO OFFICERS OF DISTRICTS—DEPOSITORY ACCOUNTS

—CH. 136; §§659.24 AND 336.15, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

### QUESTION:

When the county commissioners and the clerk of the circuit court of a county comprise the ex officio board and clerk of a special taxing district, are their depository accounts, in the absence of special statutory provision,

**governed by Ch. 136 or §659.24, F. S.?**

Where the applicable statutes and laws establishing or providing for the establishment of the special taxing district, mentioned in the above question, contain provisions regulating the depository accounts of the district, such provisions will control and should be followed unless such provisions are directory and not mandatory. Where such applicable statutes and laws contain such provisions they should be carefully examined, in the light of said Ch. 136 and §659.24, to determine whether exclusive, or not, and if found exclusive they must be followed. However, where the applicable statutes and laws establishing or providing for the establishment of such districts are silent on the question of depository accounts, then the application of said Ch. 136 and §659.24, becomes material.

It was the intention of the legislature, by its adoption of Ch. 136, F. S., to extend said Ch. 136 to "all funds of such county or the board of county commissioners, or the several county officers or of the board of public instruction of such county." An examination of the history of this chapter reveals that its purpose was to regulate the deposit of county funds as such, including "separate and district county funds," which phrase does not seem to extend to separate districts having the county commissioners as an ex officio board, as distinct from districts presided over by county commissioners as such; for example, county special road and bridge districts under prior Ch. 140, F. S., repealed in 1955, but see §§336.15, F. S., 1959, which are under the jurisdiction of the board of county commissioners as such.

Presuming that the above question relates to those special taxing districts, existing as entities separate and apart from the state or a county, with the county commissioners of a county as their administrative board, their depository accounts would *not be controlled* by Ch. 136, F. S., which relates to counties and their agencies, boards, officers, etc., but not to entities separate and apart from a county. An example of such an administrative board would be the county commissioners of St. Lucie county, as the administrative board of the Fort Pierce Inlet district, pursuant to Ch. 22298, 1943, which was upheld in *State v. Crooks*, 153 Fla. 694, 15 So. 2d 675. Chapter 136, F. S., relates to districts and other entities which are agencies, boards, etc., of counties, not those which are independent of the county as such, although presided over by the county board as an ex officio administrative board.

Section 659.24, F. S., makes state banks, upon meeting the statutory requirements, *depositories of public moneys*, under regulations as provided by the banking commissioner. This seems to raise the question of what was intended by the term "public moneys," and whether funds or moneys of special taxing districts, under an administrative board composed of county commissioners acting ex officio, are within the term. In 37 C. J. S. 1404, at note 35, it is stated that "the term 'public funds' means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law and appropriated . . . for some governmental purpose." In *U. S. Fidelity and Guaranty Co. v. Sunflower County, Miss.*, 12 So. 2d 142, text 144, the supreme court of Mississippi held drainage district funds "public funds" within a similar Mississippi statute. To the same effect is *Re Bank of Nampa*, 29 Idaho 166, 157 P. 1117, text 1118; *Lower Colorado River Authority v.*

Chemical Bank and Trust Co. Tex. Civ. App., 185 S. W. 2d 461, text 468; and *Storen v. Sexton, Ind.*, 200 N. E. 251, 104 A. L. R. 1359, text 1363. Separate governmental agencies presided over by county commissioners as their ex officio administrative board, and their moneys or funds, appear to be within the purview of §659.24, F. S., in the absence of some applicable special or local law providing otherwise.

The above question is, therefore, answered generally as to Ch. 136, F. S., *in the negative*, where the agency or district, is separate and apart from the county, although presided over by an administrative board composed of county commissioners, but in the affirmative as to §659.24, F. S., under like conditions; provided, however, there are no applicable statutes or laws, including local and special acts, other than above mentioned.

060-78—April 15, 1960

### STATE INSTITUTIONS

#### ELIGIBILITY OF A CHILD OF A CANADIAN CITIZEN TO ENTER SUNLAND TRAINING CENTER—CHS. 393 AND 394; §§393.11 AND 394.27, F. S.

To: *Arthur G. Dozier, Director, Division of Child Training, Mari-anna*

#### QUESTION:

**May a child whose parents are Canadian citizens and who have moved to Florida be eligible for admittance to one of the Florida sunland training centers?**

At the outset it is noted that there is no explicit provision in Ch. 393, F. S. (dealing with Florida farm colony), analogous to the provision of §394.27, F. S., which provides that only a person who has been a bona fide resident of the state for one year preceding examination of said person may be committed to a Florida state hospital. However, it is apparent that facilities of the Florida state colony are intended for residents of the state because §393.11, F. S., states that a county judge may commit only those persons who reside in his county.

Residence for the purpose of Ch. 393, *supra*, may mean "legal residence," which is synonymous with domicile and requires an intent to remain, or "general residence," which only involves the place of abode or dwelling and does not necessitate any permanency. Even assuming that the more strict "legal residence" is intended, the child in question may be eligible for admittance to sunland training center. In A. G. O. 044-164, p. 359 of the 1943-44 biennial report of the attorney general, it was held that the legal residence required by §394.27, F. S., did not require citizenship (28 C. J. S., p. 20). It follows that the parents of the child in question may become bona fide residents of the state.

The general rule of law is that a mentally incompetent person cannot entertain the necessary intent to form a bona fide residence. This would at first appear to prevent the child from meeting the residential requirements; but in A. G. O. 046-170, p. 528 of the 1945-46 biennial report of the attorney general, it was stated that the general rule of law is that the domicile of a legitimate child follows that of the father. The case of *Minick v. Minick*, 149 So.



483, gives further support for this proposition. (See also 28 C. J. S., p. 27.)

A. G. O. 046-170, *supra*, held that the child in question there could not be admitted to sunland training center because the child was illegitimate and the mother was guilty of desertion and abandonment; because of these unusual circumstances, the general rule that the domicile of the mother would be the domicile of the illegitimate child was not applicable.

In our present situation, the factual exceptions such as illegitimacy, desertion, or abandonment are not present; and there is no justification for deviating from the general rule that the domicile of the husband (the child's father) will be the domicile of the child. It therefore follows that the child may acquire the legal residency or domicile of his parents and would be eligible for admittance to sunland training center. It is a *fortiori* that if the residence intended in Ch. 393, F. S., meant temporary dwelling place, the child would be eligible for admittance, as such interpretation of residency is less restrictive than the one adopted for the purpose of this opinion.

In conclusion, if the Canadian parents move to Florida with their child with bona fide intent to make Florida their permanent abode, the parents and the child will immediately acquire the legal residence intended by Ch. 393; and the child will be eligible for admittance to Florida sunland training centers.

060-79—April 15, 1960

#### SCHOOL CODE

#### TEACHING SERVICE—SALARY SCHEDULES—CH. 236;

§§230.23(5)(e), 231.15, 236.02(6)(b), (c), 236.07(3)

(b), 238.01(4), F. S., CH. 59-339

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### QUESTIONS:

1. Are all services specified in §238.01(4), F. S., to be included as "teaching service" in the county board of public instruction salary schedules adopted pursuant to §236.02(6)(b), F. S.?

2. Is the term "teaching service" used in the apportionment of minimum foundation program funds in §236.07(3)(b), F. S., the same as the "teaching service" referred to in question 1 above?

3. If the answer to question 2 above is in the affirmative, shall the county school board, in recognizing teaching service for the application of the adopted salary schedule, recognize services rendered by a certificated individual only in those fields or areas for which a certificate is required, or should all services rendered during the period of employment by the school board be included?

4. If the answer to question 2 above is in the affirmative, shall the state superintendent, in computing the allocation of minimum foundation program funds, include services rendered by a certificated individual only in those fields or areas for which a certificate is required, or should all services rendered during the employment

by the school board be included?

5. May a county board of public instruction, in adopting a salary schedule for the payment of instructional personnel pursuant to §230.23(5)(e), F. S., which includes both minimum foundation program funds and local funds, make provision for the recognition of services or experience beyond those stated in question 1 above?

6. If the answer to question 5 above is in the affirmative, and if the county board desires to recognize service, for the purposes of the salary schedule adopted pursuant to §230.23(5)(e), beyond that which may be recognized for the allocation of minimum foundation program funds, is it necessary that said policy be incorporated in the salary schedule; or may the board authorize the recognition of such service for an individual by a resolution or motion in the minutes? In the absence of a provision in either the salary schedule or in the minutes, is the payment of a salary which has apparently been calculated on such service sufficient evidence of the board's policy?

7. Is the effective date of Ch. 59-339, §7, so far as salary for personnel is concerned, the beginning of the fiscal year July 1, 1959?

Section 238.01 (4), F. S., provides:

"Teacher" shall mean any member of the teaching or professional staff and any certificated employee of any public free school, of any county school system and vocational school, any member of the teaching or professional staff of the Florida industrial school for boys, Florida industrial school for girls, Florida school for the deaf and the blind, Apalachee correctional institution and any tax-supported institution of higher learning of the state, and any member and any certified employee of the state department of education, any certified employee of the retirement system, any full-time employee of any nonprofit professional association or corporation of teachers functioning in Florida on a state-wide basis, which seeks to protect and improve public school opportunities for children and advance the professional and welfare status of its members, any person now serving as county superintendent of public instruction, or who was serving as county superintendent of public instruction on July 1, 1939 and any hereafter duly elected or appointed county superintendent of public instruction, who holds a valid Florida teachers' certificate. In all cases of doubt the board of trustees shall determine whether any person is a teacher as defined herein.

Section 236.07 (3) (b), F. S., provides:

For each instruction unit sustained by instructional personnel under continuing contract in ranks I, II and III, there shall be added three hundred dollars; and for each instruction unit sustained by instructional personnel under continuing contract in ranks I, II and III who have completed ten years of continuous efficient teaching service in Florida public schools as aforesaid there shall be added three hundred dollars in addition to the above; provided,

for any county, which by local law a tenure program is provided in lieu of continuing contracts, the state board of education shall by regulations provide for the recognition and application of comparable tenure requirements in lieu of the requirements herein relating to continuing contracts.

Section 236.02 (6) (b), F. S., provides:

Additional yearly increments to each such member under continuing contract, in recognition of experience and professional growth, assuring a minimum annual salary of five thousand dollars, commencing with the eleventh year of efficient teaching service in the public school system of this state, and including the services as set forth in §238.01 (4) such service to be continuous except for leave duly authorized and granted provided that service as a teacher as defined in §238.01 (4) shall be construed as a part of continuous service where the continuity of educational service is uninterrupted; and

Section 230.23 (5) (e), F. S., provides:

*Compensation and salary schedules.*—Adopt a salary schedule or salary schedules to be used as a basis for paying members of the instructional staff and other school employees, such schedules to be arranged, insofar as practicable, so as to furnish incentive for improvement in training and for continued and efficient service; fix and authorize the compensation of members of the instructional staff and other school employees on the basis of such schedules.

AS TO QUESTION 1:

Section 236.02 (6) (b), F. S., specifically provides that its provisions shall include teaching service as defined or set forth in §238.01 (4), F. S. Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

Chapter 59-339 amended Ch. 236, F. S.

Chapter 236 as it is now carried in the 1959 edition of Florida Statutes includes in §236.07 (3) (b) a provision for apportionment of minimum foundation program funds. This section refers to "... teaching service in Florida public schools as aforesaid. . . ." (Emphasis supplied.) This reference must necessarily be read in conjunction with the definitions of teaching service provided in other sections of Ch. 236, F. S. (specifically in §236.02 (6) (c). Your question is therefore answered in the affirmative.

AS TO QUESTION 3:

Section 238.01 (4), F. S., provides, in part "Teacher" shall mean any member of the teaching or professional staff and any certificated employee of any public free school . . ." (Emphasis supplied).

Section 231.15, F. S., provides:

*Positions for which certificates required.*—Each person employed or occupying a position as administrative assistant to the county superintendent, school supervisor, helping teacher, principal, teacher, attendance assistant, school librarian, or other position in which the employee serves in an administrative or instructional capacity in any public school of any county of this state, shall hold

the certificate required by law, and by regulations of the state board in fulfilling the requirements of the law for the type of service rendered.

It would appear therefore that "teacher" as defined in §238.01 (4), F. S., would include persons who are certificated and presently employed in positions for which certificates are required as provided in the act.

#### AS TO QUESTION 4:

In computing applicable prior service, the same rule should be applied. In other words, applicable prior service could only include service in a position for which a certificate was required, except as otherwise provided by §238.01 (4), F. S.

#### AS TO QUESTION 5:

Section 230.23 (5) (e), F. S., is set forth in full above. The legislature has given the county school board broad general discretionary authority in establishing schedules which shall "insofar as practical . . . furnish incentive for improvement in training and for continued and efficient service. . . ."

This authority applies to both teachers "and other school employees."

In my opinion, however, allocation of minimum foundation incentive funds is limited to the classes of employees and services defined in §238.01 (4), F. S., described above. Incentives provided in establishing salary schedules for "other school employees" not included in the definition of teaching services as defined in §238.01 (4), F. S., must be paid solely from local funds. The local board may provide incentive pay for all employees, solely from local funds, for recognition of services or experience beyond those stated in question 1 above. Your question is answered accordingly.

#### AS TO QUESTION 6:

Salary schedules must be uniform in their application regardless of whether they are paid from local or state funds.

If a county board desires to establish salary schedules from local funds beyond those authorized for allocation of minimum foundation funds such schedules must be uniform in their application based upon a reasonable classification of the various positions to be filled. These salary schedules should not vary for particular individuals but must necessarily vary as to job classifications. For example, the board does not have to pay all high school principals the same salary but these variations may not be made on an individual basis. They must be predicated upon reasonable classifications which take into consideration factors such as the size of the school, the experience and educational qualifications required of the person who is to be employed and such other factors relating to training and experience as the board may determine to be necessary and reasonable to be applied to the particular job classification involved.

In establishing said classifications, the board must do this in its official policy as set forth in its salary schedule as required by §230.23 (5) (e).

#### AS TO QUESTION 7:

Chapter 59-339 did not provide an effective date. It therefore became effective 60 days after adjournment of the 1959 legislature or on August 4. For all practical purposes, it affects salary schedules beginning with the fiscal year July 1, 1959.



060-80—April 21, 1960

(Revised by opinion 060-133, p. 653)

### TAXATION

#### ST. AUGUSTINE AIRPORT; FAIRCHILD ENGINE AND AIRPLANE CORPORATION—§192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Should the lands in St. Johns county, or any part thereof, known as the St. Augustine municipal airport, under lease to the Fairchild Engine and Airplane Corp., be subjected to ad valorem taxation?

The airport in question is owned by the city of St. Augustine, but is subject to that certain lease agreement by and between the said city and the Fairchild Engine and Airplane Corp., bearing date of Aug. 4, 1954, for a term of 10 years ending Aug. 4, 1964, with an option for an extension beyond said Aug. 4, 1964. The lease grants a 10-year leasehold interest in an area of 21 acres of the said airport, evidently for administrative offices and other exclusive or semi-exclusive use by the lessee, and the use of the airport itself for the purpose of airplane takeoffs, landings and storage, subject, however, at all times to general public use by those desiring to use the airport in the usual manner.

Under the terms of the second numbered paragraph of the lease "the lessee shall maintain the lands and premises in good operating condition, operate the airport for the use and benefit of the public; make available all airport facilities and services to the public without unjust discrimination; and refrain from imposing or levying excessive, discriminatory or otherwise unreasonable charges or fees for any proper use of the airport or its facilities or for any airport service. The lessee shall provide ground space, to the extent available, to others desiring to conduct aeronautical operations on the airport . . . nothing herein contained shall be construed to grant or authorize the granting of an exclusive right" to any person or persons to the exclusion of others in the same class (see §1622(g)(2)(C), title 50, U. S. code). It appears from the terms of the lease itself that there was no intention to exclude the air traveling public from the airport. The use by the public of the airport in the usual manner continues under the terms of the lease.

The interest of the Fairchild Engine and Airplane Corp., under the said lease, being that of a lessee for a term of years, such interest is not subject to taxation under the supreme court's opinion in *Park-N-Shop, Inc. v. Sparkman, Fla.*, 99 So. 2d 571, holding that no provision is made in the Florida statutes and laws for the separate taxation of leasehold interests in real property. The *Park-N-Shop* case was followed in *Patrick Gardens, Inc.*, and *Patrick Village, Inc.*, Fla. 100 So. 2d 626. See also *Illinois Grain Corp. v. Schleman, Fla. App.* 114 So. 2d 307, text 310. The statutes of this state, in the light of said opinions, do not authorize the separate assessment and taxation of leasehold interests in lands. The interest of the Fairchild Engine and Airplane Corp., under the said lease, is not subject to ad valorem taxation.

Under §192.06, F. S., "all public property of the several counties, cities, villages and school districts of this state, used or

intended for public purposes . . ." are exempted from ad valorem taxation. Although the airport has been leased to the Fairchild Engine and Airplane Corporation for certain purposes the right of the public to usual use of the airport is preserved by the lease, and, furthermore, the lessee is required to render to the air traveling public the usual airport services. From this standpoint the lessee is agent of the city for the performance of such services, although it also has the use of the airport facilities under the said lease. The airport is at least prima facie a municipal airport operated for municipal purposes. Unless the tax assessor should find upon investigation that the above factual situation is not correct and that the airport is used exclusively by the lessee to the exclusion of the public we feel that it is entitled to tax exemption as municipal property used for a municipal purpose.

The above question, subject to such further investigation by the county tax assessor as he may deem proper, is answered in the negative.

060-81—April 21, 1960

# **SUITS AGAINST THE STATE, ITS AGENCIES, OFFICERS & EMPLOYEES**

## **TORT LIABILITY OF THE STATE, THE BOARD OF COMMISSIONERS OF STATE INSTITUTIONS AND EMPLOYEES—**

§17, ART. IV; AND §27, ART. III, STATE CONST.;  
CH. 965, §§965.01 (3), 965.03 AND 965.05, F. S.

To: *Terry C. Lee, Coordinator, Board of Commissioners of State Institutions, Tallahassee*

### **QUESTIONS:**

1. Is the state liable for tort injuries to persons occurring in connection with the operation of the institutions under the division of mental health of the board of commissioners of state institutions?

2. Is the board of commissioners of state institutions liable for tort injuries to persons occurring in connection with the operation of the institutions under the division of mental health of the board of commissioners of state institutions?

3. Are the members of the board of commissioners of state institutions liable individually for tort injuries to persons occurring in connection with the operation of the institutions under the division of mental health of the board of commissioners of state institutions?

4. Is the director of the division of mental health of the board of commissioners of state institutions liable individually for tort injuries to persons occurring in connection with the operation of the institutions under the division of mental health of the board of commissioners of state institutions?

5. Are the superintendents of the institutions under the division of mental health of the board of commissioners of state institutions, liable for tort injuries occurring in connection with the operation of the institution under their direction?

6. Are the employees of such institutions liable for

tort injuries to persons occurring in connection with patients under their responsibility or care?

7. If tort liability is indicated as to any of the above questions, may the board of commissioners of state institutions procure protective insurance under present statutes and laws? Or,

8. May legislation be adopted to protect those who may be liable for tort actions in this connection?

The board of commissioners of state institutions is a constitutional board (§17, Art. IV, State Const.) which has "supervision of all matters connected with such institutions (of the state) in such manner as shall be prescribed by law." This board is given jurisdiction and direction over the state prison system, the training schools for girls and boys, and the mental hospitals and similar institutions (Ch. 965, F. S.). These institutions are divided, for the purposes of administration, into three divisions: The division of corrections, the division of child training, and the division of mental health. Our present concern is with the division of mental health and its administration and operation. The board of commissioners of state institutions is an agency of the state, charged with the direction and control of the division of mental health, as well as the other two divisions. (Ch. 965, F. S.).

The board of commissioners of state institutions is charged with the director of the division of mental health, including the appointment of "a director to serve as the administrative, planning and coordinating head of each of the" three divisions above mentioned, as well as the employment of "such staff personnel as may be required for the proper performance" of the duties of such division. "Each divisional director shall be responsible to the board of commissioners of state institutions for the proper administration of the institutions and programs under the jurisdiction and supervision of his division." Such director is required, through education, training and experience, to be qualified to be an administrator of the division to which appointed (§965.03, F. S.). The board of commissioners is vested with authority to "adopt and promulgate such regulations as it deems necessary for the proper conduct and administration of the institutions under its jurisdiction." (§965.05, F. S.). The directors of the three divisions, provided by §965.01, F. S. not being either elected by the people or appointed by the governor, in accordance with the requirements of §27, Art. III, State Const., are evidently administrative employees of the board of commissioners and not state officers, although the division administrators as well as the superintendents of the institution have supervision over other employees; they are supervising employees.

"The doctrine of the nonsuability of the State rests on public policy and should be liberally construed to effectuate the purpose for which it was designed. . . . Section 2, Article 3, of the Federal Constitution, limits the rule slightly but otherwise the State cannot be sued without its consent. As to tort actions, the rule is universal and unqualified unless relaxed by the State." (State Road Dept. v. Tharp, 146 Fla. 745, 1 So. 2d 868, text 869). Section 22, Art. III, State Const., should not be construed as placing the state within the reach of court process, in the absence of legislation in conformity with said section (Hampton v. State Bd. of Education,

90 Fla. 88, 105 So. 323, text 326, 42 A. L. R. 1456, Sou. Drainage Dist. v. State, 93 Fla. 672, 112 So. 561, text 566). "As a general rule, in the absence of constitutional or statutory provision therefor, a state exercising governmental functions cannot be made to respond in damages for tort." (81 C. J. S. 1137, §130; see also 49 Am. Jur. 291, §78, and 81 C. J. S. 1143-1144, §131). "Thus, state institutions, such as hospitals and asylums for the care of mental defectives, houses of correction, industrial and reform schools, and the like . . . are exempt from liability for torts of officers, agents, or servants of such institutions." (49 Am. Jur. 291-292, §78). This rule of nonliability of the state for torts of its officers, agents and servants applies to those agencies through which the state acts in the administration of government as well as the state itself. From these authorities it follows that neither the state nor its board of commissioners of state institutions, as a state agency, is liable in tort in the absence of a statute providing otherwise. This answers question 1, as well as question 2 in so far as the liability of the board as a state agency is concerned, leaving unanswered the question of the tort liability of board members as individuals.

We come next to the tort liability of board members and the division directors, the superintendents and employees of the board. The employees range from professional employees to ordinary or common labor, the professional employees exercising considerable direction and supervision over other employees. It may be advisable to remark at this point that the state's immunity from suit, extending to its governmental boards, agencies, etc., as such, is an attribute of sovereignty and may not be invoked by public officers and employees when sued for their own torts. One cannot escape the consequences of his wrongful act on the ground that it was an official act. (67 C. J. S. 417-418, §125). "The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conducts of any of its officers, agents, or servants, committed in the performance of their duties. In other words, the doctrine of respondeat superior does not apply to sovereign states unless through their legislative departments they assume such liability voluntarily." (49 Am. Jur. 288-289, §76.)

"The general proposition that an officer is not liable for the defaults and misfeasances of his clerks or assistants, even though they are appointed by him and are under his control, in the absence of allegation and proof that the officer was negligent or at fault in failing to exercise proper care and prudence in selecting the assistant or clerk, or in failing to properly supervise and superintend the acts and services of such employe in the work for which he was so selected, the doing, or failure to do which caused the loss or injury or damage, is well settled. In such cases, in the absence of a special statute or law to the contrary, the assistant or clerk, and his bondsmen if any he have, are liable, *but not the officer* or his bondsmen." (Emphasis supplied.) (State v. Jolb, 201 Ala. 439, 78 So. 817, text 818, 1 A. L. R. 218; see also Annotations in 1 A. L. R. 222-274, 102 S. L. R. 174-196, and 116 A. L. R. 1064-1073). "As a general rule and apart from statute, public officers, when acting in good faith within the scope of their authority, are *not liable* in private actions, and the application of this rule of im-



munity cannot be avoided by allegations that the officer involved was acting or is being sued in his personal capacity. Mistakes of judgment, or improper construction of the laws defining his duties, by a public officer acting in the discharge of his official duties do not give rise to a personal action against him, although some individual may suffer loss as a result thereof" (67 C. J. S. 417-418, §125; see also 81 C. J. S. 1039-1040, §84). (Emphasis supplied.) "They may, however, be liable where they participate and direct the tortious act of a subordinate, since the act is in contemplation of law the act of the superior." (81 C. J. S. 1041, §84). "When a public officer goes outside the scope of his authority or duty, he is not entitled to protection because of his office, but is liable for his acts like any private individual." (67 C. J. S. 419, §126). "In order that acts may be done within the scope of official authority, it is not necessary that they be prescribed by statute, or even that they be specifically directed or requested by a superior officer, but it is sufficient if they are done by an officer in relation to matters committed by law to his control or supervision, or that they have more or less connection with such matters, or that they are governed by a lawful requirement of the department under whose authority the officer is acting." (43 Am. Jur. 85, §273.)

"The doctrine of respondeat superior applicable to the relation of master and servant . . . does not, in the absence of statute, apply to a public officer so as to render him responsible for the acts or omissions of subordinates whether or not appointed by him, unless he, having the power of selection, has failed to use ordinary care therein, or unless he was negligent in supervising the acts of such subordinate, or was a party to the acts, or directed, authorized, ratified or encouraged the wrong or co-operated therein." (67 C. J. S. 423-424, §128). "In the absence of a statute to the contrary, state officers are not personally liable for the wrongful acts of agents, servants or other persons acting under them when they themselves have been guilty of *no personal neglect, misfeasance or wrong*, and the rules of respondeat superior are inapplicable to such situation." (81 C. J. S. 1040, §84). (Emphasis supplied.) Where an officer or employee exceeds "the power conferred on him by law, he cannot shelter himself by the plea that he is a public agent acting under color of his office, or that the damage was caused by an act done or omitted under color of his office, and not personally. In the eyes of the law, his acts then are wholly without authority. In this connection, a careful distinction must be drawn between erroneous acts in the exercise of jurisdiction or authority and acts in excess of jurisdiction." (43 Am. Jur. 90, §277). "If an officer, even while acting under color of his office, exceeds the power conferred on him by law, he cannot shelter himself under the plea that he is a public agent. Neither an officer nor an agent can properly be said to have acted under color of a law which gave neither him or any other person authority to do the act in question." (43 Am. Jur. 86, §273).

"In the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistants, an officer is not liable for the default or misfeasance of subordinates and assistants, whether appointed by him or not, providing the subordinates or assistants, by virtue of the law and of the appointment, become in a sense officers themselves, or servants of the

public, as distinguished from servants of the officer, and providing the officer does not direct the act complained of, or personally cooperate in the negligence from which the injury results." (43 Am. Jur. 94-95, §281). "Officers of the state in charge of such institutions (hospitals and asylums for the care of mental defectives, houses of correction and industrial and reform schools) are not liable in tort for acts in the exercise of an official discretion, or for the negligence or wrongs of their subordinates." (49 Am. Jur. 292, §78).

The general rule appearing from the foregoing authorities appears to have been adopted in this state, especially as to the office of sheriff. "At common law the sheriff was liable for the acts of his deputies when performed *within* the scope of their legal authority and by virtue of his office." (Swenson v. Cahoon, 111 Fla. 788, 152 So. 208). "It is the general rule that sheriffs and other officers performing similar duties are civilly liable but not criminally for acts and omissions of their deputies when performed within the scope of their legal authority and by virtue of their office." (Malone v. Howell, 140 Fla. 693, 192 So. 224, text 226, and Holland v. Mayes, 155 Fla. 129, 19 So. 2d 709, text 710). "Any liability on the part of the Sheriff, therefore, is derived from his liability for the acts of his deputy done officially or under color of his office." (Warren v. Hall, Fla., 66 So. 2d 231).

Neither the state nor the board of commissioners of state institutions, as an agency of the state, is liable for tort and may not be sued in tort absent express legislation authorizing such suits adopted pursuant to §22, Art. III, State Const. The state and its agencies are not liable for injuries arising from neglect or other tortious acts of conduct of its officers, agents or servants, committed in connection with the performance of their obligations and duties. The officers of the state, including officers of boards, commissions and other agencies, are not liable for the defaults and misfeasances of their clerks, agents, assistants and employees done outside of the scope of their legal authority and beyond their official duties; such officers are liable only for defaults and misfeasances of clerks, agents, assistants and employees done within the scope of their legal authority and by virtue of their offices. However, such officers are personally liable for defaults and misfeasances, although done without the scope of their legal authority and official duties, when done at their direction. When a public officer goes outside of the scope of his authority or duty he is liable for his acts like any private individual. Board members, the divisional director, the institutional superintendents, as well as all employees, are personally liable for defaults and misfeasances done beyond or without the scope of their duties. Superiors, although normally not liable for defaults and misfeasances of those under their supervision, are liable for any such defaults and misfeasances done under their supervision or direction.

There being technically no state torts, any torts occurring in connection with the operation of the institutions under the division of mental health of the board of commissioners of state institutions, by reason of the action of any board member, director, superintendent or employee, is the personal liability of the one responsible for the default or misfeasance giving rise to such tort, either through direct action or by direction. These torts being the liability

of individuals, and not the state or its board of commissioners of state institutions, are not state or board, but individual, liabilities. The individual responsible for the tort, not the state or its agency, is the one the law looks to for settlement of such liability. The line of demarcation between liability and nonliability for injuries occurring, which may or may not constitute tort, is a fine one determinable only by the courts in each particular action. The actions of the personnel of the division of corrections, when dealing with hospital patients, is often one taken at a hazard although according to normal hospital practice. Insurance for the protection of the public in this connection, bears some relation to motor vehicle insurance for public vehicles, and both would seem to be justified for like or similar reasons. However, no legislation now exists authorizing the taking out of such insurance at state expense. We feel that state funds may be appropriated for the purchase of such insurance, but the question seems to be primarily a legislative question.

As to legislation prohibiting the bringing of tort actions against officers, directors, superintendents and employees, when such actions arise by reason of actions of such persons in the administration of their duties under the division of mental health, questions of the validity of such legislation present a problem. Such actions would be actions against individuals and not against public officers as such. The theory of such actions would seem to be that they involve defaults and misfeasances beyond official authority and duties, and are therefore actions against individuals and not public officers. Under §4, Florida Declaration of Rights "all courts in this state shall be open, so that every person for any injury done him in his lands, goods, person and reputation shall have remedy, by due process of law . . . ." This provision "secures individual rights against unconstitutional invasion by the state, as well as from violation by other governmental agencies and individuals." (*Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451, text 454). "It is certain that the makers of the constitution did not intend that one injured in 'lands, goods, person or reputation' be deprived of a right of action." (*Wilson v. Lee Memorial Hosp.*, Fla., 65 So. 2d 40, text 41). As punitive damages are allowed, "not as compensation to the plaintiff, but as a deterrent to others inclined to commit a similar offense, and their allowance depends on malice, moral turpitude, wantonness or outrageousness of tort . . . it cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant" and violated §4 of the Florida Declaration of Rights. (*Ross v. Gore*, Fla., 48 So. 2d 412, text 414). In *Rotwein v. Gersten*, 160 Fla. 736, 36 So. 419, it was held that when a common law action becomes one of grave abuses, extreme annoyance, embarrassment, humiliation by the unscrupulous for their own enrichment so that the best interests of the people of Florida will be served by its abolition that such common law action may be abolished notwithstanding §4, Florida Declaration of Rights. The so-called auto guest statute (§320.59, F. S.) was upheld in *McMillan v. Nelson*, 149 Fla. 334, 5 So. 2d 867, text 869 and 890, and *Cormier v. Williams*, 148 Fla. 201, 4 So. 2d 525; this statute limits liability and does not purport to abolish the action. These cases seem to indicate that punitive damages in connection with the torts under discussion may be abolished; however, serious doubt exists as to the power of the

legislature to abolish actions for tort due to personal tort of the personnel mentioned in the above stated questions.

From the above and foregoing the following answers are suggested to the above stated questions:

1. This state, in the absence of a statute providing otherwise, is not liable for tort.

2. The same answer applies to the board of commissioners of state institutions as a state agency.

3. Members of the board of commissioners of state institutions are not liable in tort for injuries arising from their actions done within the scope of their authority and by virtue of office, but would be liable for injury due to actions beyond the scope of their authority and unofficial.

4. The same rule mentioned in item 3 above also applies to the director of the division of mental health, as an employee.

5. The same rule mentioned in item 3 above also applies to the superintendents of the institutions, as employees.

6. The same rule mentioned in item 3 also applies to employees as such.

7. Legislation would seem to be required to authorize the obtaining of insurance at public expense.

8. Any legislation purporting to relieve the officers, directors, superintendents, and employees of the division of mental health from tort liability in connection with their employment or duties would be of questionable validity, because of §4, Florida Declaration of Rights, except as to punitive damages.

060-82—April 21, 1960

### TAXATION

#### DOCUMENTARY STAMP TAXES—PROMISSORY NOTES MADE IN OTHER STATES—§201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Is a promissory note made in Maryland, by a Delaware corporation, to a Florida bank, payable at a bank in New York, subject to Florida documentary stamp taxes?**

We have examined a copy of the promissory note in question, from which it appears that the Commercial Credit Co., a Delaware corporation, having borrowed a sum of money from the First National bank of St. Petersburg, Florida, which was evidenced by a promissory note, purporting to have been executed by the Commercial Credit Co., in Baltimore, Maryland, on March 10, 1960, payable, on June 8, 1960, to the First National bank of St. Petersburg, Florida, at the office of the First National city bank, in New York City.

There is evidence in the file that the money borrowed was paid through a check drawn, by the St. Petersburg bank, on its account in a correspondent bank in New York city; and further, that the said promissory note is in the hands of the First National city bank for collection. There is a statement in a letter to the state comptroller, by one of his employees, that "the loan was made out of the state and the money delivered by the banks corresponding bank in New York and the original note stayed in New York and the photo copy was returned to the bank's file."



Section 201.08 F. S., imposes a documentary stamp tax "on promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages, or other compensation, made, executed, delivered, sold, transferred or assigned *in the state* . . ." Although the promissory note is the property of the Florida bank, there is evidence that it has never been physically within this state. In *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 515, 75 L. ed. 1126, two types of notes were involved, one type was made in South Carolina, by a South Carolina corporation, and sent to New York city to evidence a loan by a bank there; the other was made in Georgia, by agents of the same South Carolina corporation, at its office in Georgia through agents located there, and likewise sent to the same New York bank to evidence moneys borrowed. The note made in Georgia was never in South Carolina until after it had been paid and returned to the maker. The court held that South Carolina had no jurisdiction to tax the notes made in Georgia, they having never been in South Carolina until after payment. The notes made in South Carolina were held subject to taxation by South Carolina in *Graniteville Mfg. Co. v. Query*, DC., 44 Fed. 2d 64.

The supreme court of Florida, in *State v. Gay*, Fla., 90 So. 2d 132, text 134, stated "we are of the view, however, that the opinion of a three-Judge Federal Court in *Graniteville Mfg. Co. v. Query*, D. C., 44 F. 2d 64, and the opinion of the Supreme Court of the United States in *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 515, 516, 75 L. ed. 1126, are strongly analogous and sufficiently so that we adopt them as a guide to our decision in the case at bar." The court then, adopting the language of Chief Justice Hughes, refers to the Florida tax as a "tax levied in relation to *an act done within the state* in making an instrument." See also *Plymouth Citrus Growers Assn. v. Lee*, 157 Fla. 893, 27 So. 2d 415. The tax imposed by §201.08, on promissory notes and other documents is upon those instruments "made, executed, delivered, sold, transferred or assigned in the state," that is, in Florida. Although the agreement, oral or otherwise, to make the loan may have been arranged in Florida, the promissory note given to evidence such loan was neither "made, executed, delivered, sold, transferred or assigned *in the state*," but in another state or states, in so far as we are able to glean from the record. The transaction seems to be squarely within the federal supreme court's decision in the *Graniteville Mfg. Co.* case.

The promissory note in question, never having been in Florida (the photo copy not being sufficient to bring the original note within the state), the above question is answered in the negative.

060-83—April 21, 1960

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
APPROVAL OF COUNTY PAYROLL WARRANTS PRIOR TO  
END OF PAYROLL PERIOD—§125.01(12), F. S.**

To: W. A. Wynne, Clerk, Board of County Commissioners, Sarasota

**QUESTION:**

May the board of county commissioners in open session approve payroll warrants prior to the time that the payroll period ends?

The approval of payroll warrants by the county commissioners

is pursuant to §125.01 (12), F. S. which delegates to the board of county commissioners the power to approve accounts against the county. In those instances where an employee is not under formal contract, the employee has no claim against the county for the periodic pay until he has given the county the service contemplated by such period. Therefore, prior to the end of the period, the full claim of the employee is not in existence; and it would appear inadvisable to approve a claim which is to occur in the future.

It is understood that expediency and convenience dictate that the county be permitted to approve the claim during the payroll period if it is legally possible because it is often infeasible for the board to meet and approve claims at the end of that period. In order to circumvent the fact that the claim is not in existence at the time the board meets, the approval of the payroll warrant should be made with a condition precedent to such approval's being final. The condition precedent should be that the employee complete his employment for the period approved. This legal device will postpone the approval's becoming effective until the occurrence of the condition at the end of the payroll period.

Your question is therefore answered to the effect that the county commissioners may approve county payroll warrants prior to the end of the payroll period, provided that they subject such approval to the condition precedent that the employee complete the payroll period involved.

060-84—April 21, 1960

**REGULATION OF VOCATIONS AND PROFESSIONS**  
**CHIROPODY, DEFINITION—X-RAY OF THE SPINE**  
 —§461.01, F. S.

To: *Daniel K. Kirk, Secretary-Treasurer, State Board of Chiropractic Examiners, Jacksonville*

**QUESTION:**

**Is it within the authority of a chiropodist to x-ray the spine and put lifts in the shoes as a means of treating the foot or leg of a patient?**

Upon receipt of your request, I wrote Dr. Heywood A. Dowling, secretary-treasurer, Florida state board of chiropody examiners, and requested the opinion of his board as to what physical condition of the foot or leg would place such diagnostic procedure within the statutory definition of the practice of chiropody.

I am in receipt of the following reply from Dr. Dowling:

This is written in reply to your letter of March 22 requesting comments of this Board with regard to the physical conditions under which this Board would consider it within the statutory definition of chiropody to x-ray the spine and put lifts in the shoes according to the distortion of the spine, as shown by the x-ray, as a means of treating the foot or leg of a patient.

We consider it within the statutory definition of chiropody to so act when the intent and purpose of such radiography is to become a part of the treatment of the foot or feet.

Let me explain that there are a number of chiropodists who take an x-ray picture of the *lower* spine only, incident

to the orthopedic treatment of the foot or feet for the simple reason that in prescribing prosthetics for the feet such x-rays are very helpful. These prosthetics, which are inserted in the shoes, vary in thickness in certain cases such that one foot might be raised higher than the other. A chiropodist is mindful of the fact that a foot condition would be over-corrected to the point where it might provoke a back ailment which did not heretofore exist. Chiropodists do not make x-ray pictures of the back for the purpose of treating the back or of diagnosing a back condition. Rather, the back pictures are made as a part of a full, balanced study which should be made in the proper rehabilitation of the feet. There are times, however, when the feet are properly balanced by the chiropodist, that back symptoms disappear. In these instances it was not the original purpose of the chiropodist to relieve the back pain but rather a deformity of the foot or feet. One can certainly understand that the feet, as the weightbearing foundation of the body, have a profound effect upon the posture such that it is difficult indeed to separate the two parts at times from a functional or pathological point of view.

In view of the foregoing explanation as to the purpose for taking an x-ray picture of the spine and the extent of the resulting treatment applied, it is my opinion that your question is answered in the affirmative, subject to the following limitations:

- (1) That the x-ray picture shall be taken of the lower spine only.
- (2) That such x-ray picture shall be used only to assist in diagnosing and treating the condition of the leg or foot as set forth in §461.01, F. S., which defines chiropody as follows:

Chiropody means the *diagnosis*, medical, surgical, palliative and mechanical treatment of ailments of the human foot or leg, except the amputation thereof; and shall include the use and prescription of local anesthetics. (Emphasis supplied.)

- (3) That the use of x-ray by a duly licensed chiropodist shall, in all events, be limited to the extent of education and training on the subject as taught in recognized and approved schools of chiropody. If, on the other hand, the subject of x-ray is not taught in the school or schools of chiropody, then the graduates thereof would not be qualified and are not licensed to use x-ray in any manner whatsoever.

I trust the foregoing will be of some assistance to you.

060-85—April 25, 1960

#### BEVERAGE LAW

CONSTRUCTION OF §1, ART. XIX, STATE CONST. AND  
§567.04, F.S.—WET-DRY ELECTIONS

To: John H. Dewell, County Attorney, Polk County, Bartow  
QUESTION:

What is the last day on which a wet-dry election may be held in connection with an application for such election, presented to the board of county commissioners of Polk County on April 19, 1960?

Subsequent to the repeal of the 18th amendment to the federal constitution, house joint resolution 83, 1933, was adopted at the general election, Nov. 6, 1934. The pertinent part of said resolution now appears as §1, Art. XIX, State Const., and so far as material to your inquiry, provides:

Elections under this Section shall be held within sixty days from the time of presenting said application, but if any such election should thereby take place within sixty days of any State or National election, *or primary*, it shall be held within sixty days after such State or National election *or primary*. (Emphasis supplied.)

The original §1, Art. XIX, State Const. 1885, did not include the words "*or primary*." This provision appears to be the basis of the decision of the Florida supreme court in the case of *Wheeler v. Meggs*, 75 Fla. 687, 78 So. 685.

An intervening 1918 amendment to said section, in compliance with the 18th amendment to the federal constitution, prohibited all activities in connection with alcoholic beverages.

Section 567.04, F. S., which deals with local option elections, presently appears in its original form as enacted in 1887. Significantly, said section makes no mention of primaries. Notwithstanding this omission in the statute, it is my opinion that the computation of time for holding wet-dry elections, when an application is presented to the board of county commissioners within 60 days of a primary election, is controlled by §1, Art. XIX, State Const. Thus, such a wet-dry election cannot be held except within 60 days after the primary.

You advise the application for such an election was presented to the board of county commissioners of Polk county on April 19, 1960. A simple computation reveals that both the first and second primary elections fall within the constitutional 60 days prohibition, hence, it is my opinion that said election must be held, because of constitutional mandate that it "shall" be held *within sixty days after any primary, subsequent to May 24, 1960, but on or before July 23, 1960.*

060-86—April 26, 1960

#### MUNICIPALITIES

FIREMEN'S RELIEF PENSION FUND—§175.13, F.S.—  
DEATH BENEFITS, HEART ATTACK—§175.161, F.S.

To: Daniel N. Meadows, City Attorney, Cocoa

#### QUESTION:

May benefits from the firemen's relief and pension fund be paid under the provision of §175.13, F.S., where a municipal fireman covered by said relief and pension fund dies of a heart attack while fighting a fire?

Section 175.13, F.S., provides a monthly pension for the widow and minor children of a fireman killed on duty. Said section provides in part that:

If a person employed by a city or town, having a firemen's relief and pension fund under the provisions of this chapter, as a duly appointed fireman *shall lose his life or later die from injuries received while in the discharge of his duties, his widow shall, so long as she remains un-*



*married, be paid a montly pension by the board of trustees, . . . (Emphasis supplied.)*

The determination of whether benefits will be paid depends upon the construction of the italicized portion of the above-quoted provisions of §175.13. *supra*; that is to say, was it the intention of the legislature by using the emphasized language appearing in the above-quoted provision to include the contingency of death from a heart attack while fighting a fire?

Pension acts should be construed in accordance with the legislative intent and in favor of those sought to be benefited; and it is the duty of the boards administering such laws of the courts to enforce them accordingly to the plain and unmistakable provisions (62 C.J.S., Municipal Corp., page 1269, §614 (c)). Such beneficial or remedial acts should be construed in favor of those sought to be benefited and the object sought to be accomplished (62 C.J.S., *supra*, pp. 1269-70).

In *Mook v. City of Lincoln*, 21 N.W. 2d 743, the supreme court of Nebraska construed a statute similar to §175.13 and permitted payment of benefits where death was attributed to a heart condition. The statute involved in that case provides in part as follows:

*In case of the death of any fireman . . . while in the line of duty, or death is caused by or is the result of injuries received while in the line of duty, then the same rate of pension . . . shall be paid to the widow . . . (Emphasis supplied.)*

The court in permitting recovery under its statute said:

*. . . The disjunctive particle "or" is used. Plaintiff argues, and we think properly, that it is used to indicate an alternative. The alternatives are clear. The pension is to be paid if death occurs while in the line of duty. Likewise, if death is caused by or is the result of injuries received while in the line of duty, then the pension is to be paid. Obviously the second alternative is broad enough, as plaintiff argues, to cover cases where injuries are received while in the line of duty causing death subsequent thereto. The legislative condition that it must be shown that death is caused by or is the result of injuries received while in the line of duty is found only in the second alternative provision. It is not a part of the first provision. To construe the statute as defendant would have us do would be to read the conditions of the second alternative provision into the first, or to read the first alternative provision out of the act. We are not permitted to do either. (Emphasis supplied.)*

The Florida statute also provides two alternative conditions for payment of benefits. A pension is to be paid to the widow of a fireman who loses his life while in the discharge of his duties; and a pension is to be paid to the widow of a fireman who shall later die from injuries received while in the discharge of his duties. The first alternative condition in §175.13, *supra*, makes no distinction between death from injury and death from illness and would appear to be broad enough to cover a situation where death results from a heart attack. The second alternative, wherein the word "injury" appears does not make a distinction as to what kind of injuries are included; viz., no distinction is made between death resulting from bodily injury and death *resulting from ab-*

*normal conditions of the body or diseases brought about by over-exertion while in the discharge of one's duties.*

The word "injuries" was construed by a Pennsylvania court to include illness as well, thus permitting recovery to the widow of a fireman who died of a heart attack while fighting a fire (*Vernon v. Firemen's Pension Fund*, 52 A. 199).

Most of the courts that have construed statutes containing provisions similar to §175.13, *supra*, have held that a causal connection between the official duties of the decedent and his death must be established in order to make the survivors eligible for benefits. A few jurisdictions have held that it is not necessary to show a causal connection between the duties of the decedent and the accident which brought about his death (see 27 A.L.R. 2d 1004-35). Under the provisions of §175.161, F. S., it is specifically provided that diseases of firemen such as hypertension or heart diseases resulting in total or partial disability are *presumed to have been suffered in the line of duty* unless the contrary be shown by competent evidence.

In view of the above statements, it is my belief that where a fireman dies of a heart attack while fighting a fire—death thus occurring in the discharge of his duties as a fireman—his widow and/or children are entitled to receive survivorship benefits provided in §175.13, F. S., since either of the two alternative conditions stated in said section is sufficiently broad to include death by heart attack. Your question is accordingly answered in the affirmative.

060-87—April 26, 1960

#### SCHOOL CODE

#### INSTRUCTIONAL PERSONNEL—EMPLOYMENT OF SUBSTITUTE TEACHERS; SALARY SCHEDULES—

§§230.23(5)(e) AND (f), 231.36, 231.37, 231.47(1)-(3),  
236.02(6)(b) AND 236.07(3)(c), F.S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

#### QUESTIONS:

1. Section 231.47 (2) F. S., provides that when any member of the instructional staff shall be absent for more than 10 days "the vacancy shall be filled in the same manner in which the regular positions are filled. . . ." Does this require that a contract must be issued, and if so, may the contract be made for an unspecified number of days?

2. May a county board, in complying with the provisions of §231.47 (3), and 231.37, adopt a single salary schedule for all substitute teachers both for service under §231.47 (1) and (2) without regard to the rank or experience of an individual?

3. If your answer to question 2 is in the affirmative, is that salary schedule subject to the restrictions that no teacher shall be paid less than 90% of the salary allotment for the rank of such teacher, as provided in §236.07 (3)(c), F. S.?

4. Is a certificated substitute teacher considered

as instructional personnel for determining the annual apportionment to each county from the foundation program fund, pursuant to §236.07, F. S.?

5. Does service as a substitute teacher either under §231.47 (1) and/or (2) count as "teaching service" toward a continuing contract and/or 10 years of service, provided the other requirements are met? (§236.02 (6) (b).)

AS TO QUESTION 1:

Section 231.47, F. S., provides:

231.47 *Substitute teachers*.—Provisions for substitute teachers shall be as follows:

(1) ABSENCE FOR TEN DAYS OR LESS.—

When any member of the instructional staff of any county is absent for any reason for ten days or less and a substitute is deemed necessary by the principal of the school or by the county superintendent to carry on the work effectively, a person properly qualified to act as substitute shall be secured by the county superintendent or by the principal to fill the temporary vacancy; provided, that a person who is not properly certificated may be employed as a temporary substitute only in cases of emergency as authorized under regulations of the county board. The amount of pay the substitute shall receive shall be determined by regulations of the county board; provided, further, that in no case shall the salary of the substitute be more than the salary which the regular employee would have received for the same period of time had such employee not been absent.

(2) ABSENCE FOR MORE THAN TEN DAYS.—

When any member of the instructional staff of any county shall be absent for any reason for more than ten days the temporary absence shall be filled as prescribed in subsection (1) herein, by a properly qualified and certificated person until the next meeting of the county board, at which time the vacancy shall be filled in the same manner in which the regular positions are filled; provided, that the county board may in accordance with the procedure prescribed for the appointment of regular teachers authorize and approve employment of properly qualified persons who are to serve regularly as substitutes.

(3) COMPENSATION OF SUBSTITUTE TEACHERS.—The county board shall adopt regulations prescribing the compensation and the procedure for compensating substitute teachers; provided, that when a member of the instructional staff is granted sick leave, illness-in-line-of-duty leave, or professional leave for absence the substitute shall be paid by the county board.

In my opinion this act provides for the temporary employment of a substitute teacher by the principal or county school superintendent in an emergency for a period of 10 days or less without having to wait for the county school board to meet and act upon the appointment.

In this situation it is possible to employ a person "... who is not properly certificated as a temporary substitute ..." under regulations of the county board.

If it is necessary to employ the substitute teacher for more than 10 days, the superintendent and principal may fill the position until the next meeting of the county school board but the teacher must be "properly qualified and certificated . . ."

At the next meeting of the school board it is contemplated that the board shall review the appointment and fill the position in the usual manner of filling "regular positions." This language, in my opinion, does not relate to the contract to be given the appointed teacher. It does relate to the manner of appointment of regular teachers which involves the statutory procedure for recommendations and nominations to be made by the principal, superintendent and trustees (in counties which still have trustees).

I believe that the kind of contract to be given teachers under these circumstances is covered by the last sentence of §231.47 (2), F. S., which provides, "... provided, that the county board may in accordance with the procedure prescribed for the appointment of regular teachers authorize and approve employment of properly qualified persons who are to serve regularly as substitutes."

In other words, it is the apparent intent of this act that the county board may employ teachers who plan to serve regularly as substitutes as the need may arise, rather than in a fixed position during the school year. Teachers employed for this purpose should be given an annual contract which sets forth these conditions of employment. Such a contract could not provide a fixed period of time during the school year for teaching services in any particular position since the obligation necessarily involves uncertainty as to when and where the substitute teacher will be called upon to teach. The contract given the teacher should therefore simply provide for employment as a substitute as the need may arise. The salary to be paid the teacher should be fixed in the contract in accord with the approved salary schedule of the county board for teachers in a similar category as to training and experience. The salary of course could only be paid when the teacher is actually working.

Specifically answering your question, I believe that the board should issue a contract to teachers who are regularly employed as substitutes. Such teachers must be properly qualified and certificated. The contract should be on an annual basis but should not attempt to stipulate a specified number of days of teaching service to be performed but should provide that the substitute teacher will be employed as the need may arise and will be paid for the number of days during the school year in which teaching services are rendered.

#### AS TO QUESTION 2:

The county board as provided in §231.47 (3) shall adopt regulations prescribing the compensation and the procedure for compensating substitute teachers.

Section 231.37, F. S., provides "any person employed in an instructional capacity shall receive the salary prescribed by the salary schedule adopted by the county board in compliance with the requirements of Chapter 230."

In accord with the discussion given in my answer to question 1, it is my opinion that all regularly employed teachers including persons regularly engaged as substitutes (as contrasted to teachers hired in an emergency for less than 10 days) must be paid in accord with a salary schedule adopted by the board which must take into consideration the training and experience of the teacher and



any other factors provided by law for the establishing of salary schedules and compensation of instructional personnel (See §230.23 (5) (e) and (f), F. S.).

**AS TO QUESTION 3:**

In accord with the above discussion, this question is answered in the affirmative.

**AS TO QUESTION 4:**

Section 231.47 (3), F. S., provides that substitute teachers shall be paid by the county board. In my opinion a regularly employed properly qualified and certificated substitute teacher under contract with the board should be considered as instructional personnel for determining the annual apportionment to each county from the state minimum foundation funds.

**AS TO QUESTION 5:**

Section 231.36, F. S., provides for continuing contracts to be given to teachers who hold a regular certificate based at least on graduation from a standard 4-year college who have completed three years of service in a county of this state and who have been re-appointed in such county for the fourth successive year.

I find no exception made in this act or otherwise which would preclude regularly employed substitute teachers who have rendered the required teaching services in accord with the law and with state board of education regulations from being issued a continuing contract or enjoying the financial benefits provided by law for 10 years of service.

Your question is therefore answered in the affirmative as to regularly employed substitute teachers but in the negative as to substitute teachers hired solely for an emergency of less than 10 days.

060-88—April 27, 1960

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
BOARD OF COUNTY COMMISSIONERS—TRANSACTING  
FOR SERVICES OF CORPORATION PARTIALLY  
OWNED BY MEMBER—§§839.09 AND 839.091, F.S.**

To: *L. Elmer Bustle, Board of County Commissioners, Manatee County, Bradenton*

**QUESTION:**

**May the county do business with a corporation in which one of the county commissioners has a major interest where such corporation is the only one in the county which can furnish the trucking service involved?**

The general rule is that a contract entered into by a board of county commissioners with one of its members is at least voidable as being against public policy (43 Am. Jur., §§ 299 and 300).

In Florida the general rule has been supplanted by specific legislative enactments. Section 839.09, F. S., prohibits a county board from purchasing supplies, goods or materials for public use from any firm or corporation in which any member of such board is directly or indirectly interested.

The purchase contemplated will involve services rather than supplies, goods or materials referred to by §839.09, *supra*. In A. G. O. 051-335, Sept. 26, 1951, pp. 383-4 of the 1951-52 biennial report of the attorney general, it was held that §839.09, *supra*, does not apply

to services. However, the opinion went on to point out on the strength of *Stubbs v. Florida State Finance Co.*, 159 So. 527, text 528, that a public official cannot legally participate in his official capacity in the decision of a question in which he was personally interested, whereby he would occupy a position where his duty as a public official is in conflict with his personal interest. (See also *Fisher v. Grady*, 178 So. 852.)

The spirit of §839.09, *supra* is against permitting transactions by the county boards with firms in which a member of said board has a membership even though it might be argued that the transaction involves only services and therefore does not fall directly under the provisions of this section.

Section 839.091, F. S., provides a method whereby the board of county commissioners will be able to contract with the firm involved in this question. This section states that the prohibition of §839.09, *supra*, will not apply in counties of less than 100,000 population if the transaction is open to public bids. Manatee county has a population of less than 100,000. It may be that in the present situation there is no legislative act requiring the particular transaction to be made open to public bids because the transaction involves an amount less than the minimum set by the statute which requires transactions to be open to public bid, or for other reasons. Even so, there is no prohibition against the transaction's being subject to public bid and thereby falling in the exception provided in §839.091, *supra*. Such extreme precaution is necessary because we are dealing with a criminal statute, and the penalty on error is severe.

Your question is answered to the effect that the transaction involved should be subject to public bid in order to bring it into the exception provided by §839.091, F. S., to the prohibitions contained in §839.09, F.S.; and the county commissioner should abstain from acting in any official capacity in reference to this particular transaction as otherwise he would violate the rule set out by *Stubbs v. Florida State Finance Co.*, *supra*.

060-89—April 27, 1960

### CORPORATIONS

SALE OF CORPORATE STOCK—FLORIDA OWNERS—  
OUT-OF-STATE EXCHANGES—TAXATION—CHS. 201  
AND 614; §§201.04, 201.08 AND 614.12, F.S.; CH. 57-107  
REPEALING §201.03 F.S.

To: *Ray E. Green, State Comptroller, Tallahassee*

### QUESTION:

**What documents used in connection with the sale of corporate stock, owned by residents of Florida, through an out-of-state stock exchange, are subject to documentary stamp taxes under Ch. 201, F. S.?**

An examination of your file, handed us with your said request for opinion, reveals that the documents usually involved are the so-called (1) cash customer's agreement (2) the customer's (margin) agreement, (3) the joint agreement, evidently used where customers trade jointly, (4) the stock certificates, and (5) separate stock assignments, used when the assignment appears separately from the stock certificate. Stock certificates usually have printed on their backs a form for assignment. Both the assignment appearing on the certificate, and the separate assignments, are substantially

the same as to form. We are advised, from your said file, that whether the assignment form appearing on the certificate, or the separate form is used, it is executed in blank without any assignee's name appearing thereon until after the completion of the sales transaction on the stock exchange. When the transaction is completed, the purchaser's name is usually filled in.

We have carefully examined the forms for (1) cash customer's agreement, and (2) the customer's (margin) agreement, and find that they are in the nature of agreements between the stockbroker and his customers, one covering cash transactions and the other margin transactions. So far as we are able to ascertain from the said file these documents are made and completed and delivered to agents of the broker here in Florida and become written obligations of the customer made, executed and delivered in this state, within the purview of *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, and are subject to taxation under §201.08, F. S. Although the sum or sums to become due and payable under said agreements are not determinable at the time of execution and delivery, and within the purview of *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, such instruments are, nevertheless, within the purview of *State v. Cook*, 108 Fla. 157, 146 So. 223, and are required to bear at least a 10¢ stamp.

The so-called joint agreement, (3) above, like the cash customer's agreement and the customer's (margin) agreement, makes provision for the payment of money under circumstances; however, this agreement is also within the purview of *Plymouth Citrus Growers Ass'n v. Lee*, supra, *Metropolis Pub. Co. v. Lee*, supra, and *State v. Cook*, supra, and likewise subject to a 10¢ documentary stamp tax. This paragraph, as well as the previous paragraph, presumes that the instruments were made, executed and delivered by the customers within the state, although they may be taken from the state after delivery. All appear to be complete agreements before they are taken from the state, if taken therefrom, so as to be within *Plymouth Citrus Growers Ass'n v. Lee*, supra.

With regard to the actual sale and transfer of the shares of stock evidenced by a stock certificate, an owner, residing or being in Florida, desiring to sell the same, takes it to his stockbroker or his agent in Florida, usually a local branch office of a stockbroker's office in New York or state other than Florida, and delivers such certificates to such stockbroker, usually through an agent located in Florida, with instructions to sell and transfer; the assignment and power of attorney, appearing on the certificate, or a like but separate assignment and power of attorney, being duly executed in blank, it being then and there understood and agreed by and between the stockbroker and the customer that the broker, or other person named in the said blank assignment and power of attorney, that upon the completion of the sale of the stock the name of the purchaser and assignee will be inserted in the signed form and the transaction and assignment completed, with the stock being thereby transferred into the possession of the assignee and new owner. In legal effect there seems little, if any, legal difference between the assignments whether made on the certificate or by separate document. The transfer or assignment of the stock to the purchaser does not appear to be a completed transaction until the name of the purchaser is inserted in the assignment form on the certificate or in

the separate form, and the certificate is delivered to the assignee or his agent.

Under Florida's uniform stock transfer law (Ch. 614, F. S.), the "title to a stock certificate and to the shares represented thereby *can be transferred only*" in the manner provided by said section; that is, (a) by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or, (b) by the delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney, to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby; such assignment or power of attorney may be "either in blank or to a specified person." (§614.03, F. S.). This provision is made applicable to stock transfers in this state "although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferrable only on the books of the corporation, or shall be registered by a registrar, or transferred by a transfer agent." The uniform stock transfer law contemplates delivery of the stock certificate as essential to the transfer of the legal title to corporate stock (§614.12, F. S.).

An ordinary customer's trading with a stockbroker consists of the delivery of a security to be sold, its sale and the remittance of the proceeds; however, often in such trading the buying and selling brokers deal directly with each other, often in their own names without disclosing the names of their customers, later making delivery of the stock to the person for whom purchased and the proceeds to the seller (see 12 C. J. S. 68, §25). It has been said that the chief feature which distinguishes a broker from other classes of agents is that he is an intermediary or middleman, and, in effecting a sale or exchange of property, acts in a certain sense as the agent of both parties to the transaction (12 C. J. S. 9, §4). As a general rule a broker has no title to the property placed in his hands for sale or exchange; and although, where he advances the purchase money he may take title in his own name, ordinarily the title to the ownership of the securities vests in the customer subject to any broker's lien for advances and commissions (12 C. J. S. 74, §29).

The assignment form, whether on the stock certificate, or as a separate document, is at most, until the sale is made in the stock exchange in another state, seems to be nothing more than a power of attorney to sell and transfer the stock, as agent of the owner, and the entry of the name of the purchaser as assignee or owner and make delivery of the stock pursuant to the sale. The same does not appear to be within the purview of §201.04, F. S., as its situs as a transaction is in another state, and §201.03, F. S., imposing a tax on powers of attorney, having been repealed by §1, Ch. 57-107. (See also *Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727, 78 L. ed. 1337.)

These observations lead to the conclusion that the cash customer's agreement and the customer's (margin) agreement, as well as the joint agreement, are subject to a 10¢ tax, unless it otherwise appears from the documents. The execution of the stock assignments in blank, being nothing more than power of attorney



to sell and transfer, being out-of-state contracts, and incomplete until completed in another state, is not subject to taxation under §201.04, F. S. However, when completed in this state, instead of another, they would be subject to taxation.

060-90—May 3, 1960

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
COMPROMISE BY BOARD OF COUNTY COMMISSIONERS OF  
ACCOUNTS OWED TO COUNTY—\$17.041, F. S.**

To: *Hally B. Lewis, Attorney, Board of County Commissioners,  
Arcadia*

**QUESTION:**

**Can a board of county commissioners legally enter into compromise settlements with private individuals who owe accounts to the county?**

As the financial agent of the county having general control over its property and the management of its business, the board of county commissioners has the power to compromise and settle claims in favor of the county and claims against the county (14 Am. Jur. 201, *Plymouth County v. Kochler*, 267 N. W. 109).

It is stated in 20 C. J. S., p. 1114:

... As a general rule, however, the county board is the agent of the county to arrange for and collect the finances of the county, and such power includes the right to institute and conduct all suits. . . . (It is significant that Section 125.01, Florida Statutes, gives the county commissioners the power to represent the county in the prosecution and defense of all legal causes.) . . . (Although in the performance of this duty the members of this board have a wide discretion and are not bound to sue a debtor of the county where they know that nothing can be recovered . . . Also compromises and settlements of claims owing to the county, or litigation based on such claims, are generally upheld by the courts in the absence of a showing of fraud or collusion, provided the compromise is made by the county board rather than by some county official, and provided the jurisdiction is not one in which the compromise of the indebtedness of an individual or corporation to a county is prohibited by constitution or by statute. (There is no specific constitutional or statutory prohibition against such compromise in Florida.) (See also 15 C. J. 586, which substantiates the above.)

If there is a genuine dispute as to the validity of the claim or as to the amount, most jurisdictions permit compromise (105 A. L. R. 173, 174). In 1942 A. G. O. 135 the attorney general took an even more liberal view and allowed a compromise even though there was a final judgment and therefore no dispute as to the validity or amount of the claim (105 A. L. R. 172, 178 gives some support to this view).

However, the compromise of *undisputed claims* may constitute a gift of county property to a private individual (*Farnsworth v. Wilbur*, 95 P. 642.) The compromise of an undisputed claim will be a gift if no benefit flows to the county. A benefit may flow even though the claim is undisputed where the debtor gives a concession to which the state is not legally entitled; such as, where the debtor

is incapable of paying the claim and agrees to pay from the proceeds of homestead property or other exempt property. If the debtor does nothing but that which he is legally bound to do, then there is no consideration for the compromise settlement; and the settlement may be successfully attacked within the limitation provision of §95.09, F. S.

Section 17.041, F. S., places upon the comptroller the duty to adjust and settle accounts certified to him by the state auditor against persons who are in any wise indebted to a county. Subsection (5) of this section says that if a county board desires to make a settlement of accounts which have been certified to the comptroller, it shall incorporate the proposed settlement into a resolution stating that such settlement is contingent upon the comptroller's approval and shall submit two copies of the resolution to the comptroller. It would appear that the legislative intent is that the comptroller pass on any compromise settlements made by the county board on accounts which have been certified to the comptroller by the state auditor.

Your question is therefore answered to the effect that the county board may compromise *disputed claims*, provided it exercises sound discretion in obtaining a compromise which is beneficial to the county's interest and the settlement is made in good faith and is free of fraud or collusion. The county board may compromise claims which are not subject to dispute pursuant to the same standards of discretion and good faith; provided, however, some benefit to the county is obtained, e.g.: where insolvent debtors agree to pay over proceeds of property which otherwise would be exempt.

If the claim to be compromised is one which has been certified by the state auditor to the comptroller, then the provisions of §17.041, F. S., are controlling; and the settlement of such claim is dependent upon approval by the comptroller.

060-91—May 4, 1960

#### PUBLIC LANDS

SUBMERGED LANDS IN CITY OF SARASOTA—OWNERSHIP AND CONTROL—CHS. 253 AND 370; §§253.12 AND 370.03, F. S.; CHS. 6532, 1913; 7304, 1917; 28145, 1953; 29941, 1955 AND 57-362; §33, ART. XVI, STATE CONST.

To: Van H. Ferguson, Director, Trustees, Internal Improvement Fund, Tallahassee

#### QUESTIONS:

1. Does §370.03, F. S., prohibit the grant, sale, or conveyance of any water bottom lands by the state or any of its agencies except as provided for under said §370.03?

Under the provisions of said §370.03(2), does the state board of conservation have exclusive power and control over all water bottoms of the state, not heretofore granted or alienated?

The legislature in 1953, enacted subsection 3(1), Ch. 28145, which as amended by subsection 1 of Ch. 29941, 1955, now found in §370.03, F. S., reads in part that:

(1) OWNERSHIP—All beds and bottoms of navi-

gable rivers, bayous, lagoons, lakes, bays, sounds, inlets, oceans, gulfs and other bodies of water within the jurisdiction of Florida shall be the property of the state except such as may be held under some grant or alienation heretofore made. No grant, sale or conveyance of any water bottom, except conditional leases and dispositions hereinafter provided for, shall hereafter be made by the state, the internal improvement fund, the commissioner of agriculture, or any other official or political corporation.

and under subsection (2), that:

(2) CONTROL—The state board of conservation has exclusive power and control over all water bottoms, not held under some grant or alienation heretofore made, including such as may revert to the state by cancellation or otherwise, and may lease the same to any person irrespective of residence or citizenship, upon such terms, conditions and restrictions as said board may elect to impose, without limitation as to area to any one person, for the purpose of granting exclusive right to plant oysters or clams thereon and for the purpose of fishing, taking, catching, bedding and raising oysters, clams and other shell fish. No such lessee shall re-lease, sub-lease, sell or transfer any such water bottom or property; provided, that nothing herein contained shall be construed as giving said board authority to lease sponge beds.

Subsequent to the enactment of §370.03, supra, the legislature enacted Ch. 57-362, now found in Ch. 253, F. S.

Chapter 57-362, supra, was an act vesting the title to all sovereignty submerged bottom lands, except for submerged lands in navigable fresh water lakes, rivers, and streams, and lands heretofore sold or conveyed, in the trustees of the internal improvement fund; providing for the disposition thereof; authorizing the establishment or alteration of bulkhead lines and regulating the filling of submerged lands.

Section 1 of said Ch. 57-362, amended §253.12, F. S., to read in part:

Except submerged lands heretofore conveyed by deed or statute, and submerged lands in navigable fresh water lakes, rivers and streams, the title to all sovereignty tidal and submerged bottom lands, including all islands, sandbars, shallow banks and small islands made by the process of dredging of any channel by the United States government and similar or other islands, sandbars and shallow banks located in the navigable waters, shall include all coastal and intracoastal waters, of the state, is vested in the trustees of the internal improvement fund. *The trustees of the internal improvement fund may sell and convey such islands and submerged lands if not determined by the trustees to be contrary to the public interest upon such prices, terms and conditions as they see fit.* (Emphasis supplied.)

Section 10 of said Ch. 57-362, provided in part that:

. . . and all laws and parts of laws in conflict herewith be and the same are hereby repealed but this act shall not be construed to be in conflict with any general or special law whereby the State of Florida has divested itself of title to

submerged lands or has granted such title to another.

Insofar as the provisions of §370.03, *supra*, seemingly prohibited the granting, sale, or conveyance of any water bottom lands by the state or any of its agencies, conflicts with, or is directly repugnant to the later provisions of §253.12, F. S., giving the trustees the power to sell and convey the described submerged lands, when not determined to be contrary to the public interest, upon such prices, terms, and conditions as they see fit, the prior section is repealed. See *Routh v. Richards*, 138 So. 69, 103 Fla. 752; *State ex rel Maxwell Hunter, Inc. v. O'Quinn*, 154 So. 166, 114 Fla. 222; *International Paper Co. v. Merchant*, 77 So. 2d 622.

Accordingly, question 1 is answered in the negative.

Question 2 concerns the extent of the control and jurisdiction of the state board of conservation over the water bottoms of the state under the provisions of §370.03(2), *supra*, which recite that: "The state board of conservation has exclusive power and control over all water bottoms, not held under some grant or alienation heretofore made . . . ."

All legislative enactments should be construed with reference to the purpose designed to be accomplished and in connection with other laws in *pari materia*, even though they contain no reference to each other. The legislative intent should be determined from the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject. The acts as construed should preserve for any and all acts their evident intent, meaning and force. *American Bakeries Co. v. Haines City*, 180 So. 524, 131 Fla. 790; *Tamiami Trail Tours v. Lee*, 194 So. 305, 142 Fla. 68; *City of St. Petersburg v. Pinellas County Power Co.*, 100 So. 509, 87 Fla. 315; *Foley v. State ex rel Gordon*, 50 So. 2d 179.

Chapter 253, F. S., is entitled "Internal Improvement Fund" and its contents provide a broad comprehensive scheme for the ownership, management, control, filling and disposal of submerged lands by the trustees of the internal improvement fund. Said Ch. 253, *supra*, provides that the trustees shall administer all state lands not vested in some other agency, that the trustees shall police, protect, conserve, improve, prevent trespass, damage or depredation upon the lands or products owned by the state under Ch. 253, *supra*; provides that, with some exceptions not here pertinent, the title to all submerged lands of the state are to be vested in the trustees, confirms all previous conveyances of sovereignty lands by the trustees, gives the trustees power to ascertain, establish or alter bulkhead lines, and power to prohibit or permit filling operations. In short, this chapter provides a detailed comprehensive plan of ownership, control, and disposition of state lands and sovereign submerged lands by the trustees.

Section 33, Art. XVI, State Const., entitled "Salt Water Fish and Salt Water Products; Regulations, etc." states that:

The legislature may vest in such board or commission, now created or that may be created by it, authority to make and establish rules and regulations without regard to uniformity of application, relating to the conservation of fish and salt water products.

Chapter 370, F. S., is entitled "Salt Water Fisheries and Conservation" and provides that it shall be the duty of the state board of conservation to preserve, protect, and manage the marine,



crustacean, shell, and anadromous fishery resources of the state in waters thereof; to regulate the operations of all fishermen and vessels of this state engaged in the taking of such fishery resources, to issue licenses or provide for the issuance of licenses, secure and maintain statistical records of the catch of each such species by various gear, by areas; to conduct scientific, economic and other studies and research. Obviously, the intent of the legislature in enacting this chapter was to provide a detailed comprehensive plan for the development and conservation of the state's salt water products.

Nowhere within the provisions of §33, Art. XVI, State Const., or Ch. 370, F. S., is there manifested any intent, or implication that the long established powers of the trustees under Ch. 253, supra, are to be abrogated or denied to the trustees. By any logical construction of the provisions of Ch. 370, supra, in relation to the provisions of Ch. 253, supra, the legislative intent is to provide for the exclusive control of the water bottoms by the state board of conservation, *insofar as that control pertains to, and affects the development and conservation of salt water resources.*

The clause providing that the agency concerned with the conservation of the salt water resources should have exclusive power and control of the water bottoms of the state was originally enacted in Ch. 6532, 1913, and as revised and amended was carried forward in the statutes as §371.02, until 1953, when by Ch. 28145, it was re-enacted into the provisions of §370.03(2).

Four years after Ch. 6532 was enacted, Ch. 7304, 1917, became law and vested title to certain tidal lands in the trustees of the internal improvement fund, and gave the trustees the power to sell and convey such lands upon such prices and terms as they saw fit. This provision of Ch. 7304 was incorporated into §253.12, F. S., and, as later revised and amended, is presently found in that section.

Inasmuch as the 1913 and 1917 acts generally referred to the same type of submerged lands, there might have been a conflict as to which agency had the exclusive power and control over the water bottoms. However, the supreme court of this state for more than 40 years since the enactment of these chapters has given to each statutory section a separate field of operation. This construction was that the trustees had the right to sell and convey the described lands, if not determined by the trustees to be contrary to the public interest, upon such prices, terms, and conditions as they saw fit, *subject, however, to the primary purposes of the trust to preserve the described lands for the people of the state for navigation, fishing, bathing, and similar uses.* See *Deering v. Martin*, 116 So. 54; *Pierce v. Warren*, 47 So. 2d 857; *Trustees of Internal Improvement Fund v. Claughton*, 86 So. 2d 775; *Hayes v. Bowman*, 91 So. 2d 795.

To specifically answer question 2: The powers given to the trustees under the provisions of Ch. 253, F. S., are subject to the provisions of §370.03(2), in that the sale, conveyance, setting of bulkhead lines or filling of the submerged lands must not constitute a serious impediment to the conservation and development of the state's water resources. All leases of water bottoms for the purpose of planting oysters, clams, or other shell fish should originate with the state board of conservation and this has been the practice for many years. The practice has also been for the trustees to

cooperate and consult with the state board of conservation in all instances where it appeared there was good reason to do so in connection with the sales of submerged lands, fixing of bulkhead lines, or approving permits for dredging or filling such lands.

060-92—May 4, 1960

# CRIMINAL PROCEDURE

## FEE OF COMMITTING MAGISTRATE IN CRIMINAL ACTION— ISSUANCE OF SEARCH WARRANT—§36.20, F. S.

To: Bryan Willis, State Auditor, Tallahassee

### QUESTIONS:

1. When a committing magistrate is allowed a flat fee for all services to be performed by him in any criminal action or proceeding, as in §36.20, F. S., and local laws with like provisions, does the issuance of a search warrant and performance of the services incident thereto constitute a criminal proceeding and entitle the magistrate to the flat fee, when a criminal prosecution is not instituted in connection with the search warrant or the result thereof?

2. If a criminal prosecution is instituted before the magistrate in connection with the issuance or result of the search warrant, is a separate fee or fees payable for the search warrant, or is one flat fee payable for the combined proceedings?

... A search warrant is an order in writing issued by a judge having jurisdiction within the district where the place, vehicle or thing to be searched may be, directed to a peace officer, commanding him to search for personal property and bring the same before said judge or some court having jurisdiction of the offense. Sections 923.11, 923.12, 933.01, 933.02, 933.06, 933.07, Florida Statutes 1951, F. S. A. 47 Am. Jur., Searches and Seizures, Sec. 3; Cornelius, Search and Seizure, 2nd ed., Sec. 150. (*Melton v. State*, 75 So. 2d 291, at p. 293)

*Search warrant proceedings, while they are in no sense criminal actions or the commencement of a prosecution, and are not of themselves complete proceedings, can be separate substantial criminal proceedings, but they are not necessarily so; they may be ancillary to the prosecution of some particular offense, and may or may not be followed by criminal prosecution, depending, perhaps, on the facts disclosed by the proceeding. Search warrant proceedings are not proceedings against a person. (79 C. J. S., §63, p. 825). (Emphasis supplied.)*

In view of the purpose of and the circumstances encompassing the issuance of a search warrant as pointed out above, it is my belief that said search warrant is not "a criminal action or proceeding" within the provisions of laws providing a fee for all services performed by a committing magistrate in any criminal action or proceeding.

In *People v. Lavendowski*, 329 Ill. 223, 150 N. E. 582, the court, in discussing the effect of a search warrant, said:

A search warrant is not an action or proceeding in which

the title to, or right to, possession of the property searched, or the liability of its custodian, is determined. These are questions which must necessarily be adjudicated *in an action or prosecution which followed the issuance and return of the search warrant.* (Emphasis supplied.)

Where a committing magistrate is entitled to a fee for all services performed by him in any criminal action or proceeding under provisions similar to those contained in §36.20, subsection (2) of which further provides that such fees shall be considered as earned "upon the entry of final judgment order therein" a search warrant would appear not to be "a final judgment order" within the contemplation of said section as to entitle the committing magistrate to his fee for the mere issuance of such search warrant (See A.G.O. 049-282 and 049-381, relating to final judgment order under §36.20 supra). If a criminal action or proceeding has been instituted in connection with the issuance of a search warrant, a committing magistrate would appear to be entitled to the payment of one fee for his services performed in said criminal action or proceeding, which fee will include his services performed in connection with the issuance of the search warrant.

In light of the above statements, your questions are accordingly answered as follows:

**AS TO QUESTION 1:**

Where no criminal prosecution has been instituted in connection with the issuance of a search warrant by a committing magistrate, said magistrate would not be entitled to a flat fee for the issuance of such search warrant under the provisions of a law providing a flat fee for "all services performed by a committing magistrate in any criminal action or proceeding." The issuance of a search warrant by itself would not constitute a "criminal action or proceeding" within the contemplation of such law. Further, a statute providing a fee for committing magistrates and containing a provision that such fees shall be earned "upon the entry of final judgment order therein," as in §36.20, supra, would not entitle a committing magistrate to a fee for the issuance of a search warrant, except as indicated in question 2.

Your question is therefore answered in the negative.

**AS TO QUESTION 2:**

If the criminal prosecution is instituted before a magistrate in connection with the issuance or result of a search warrant, only one fee is payable for the combined proceedings. Question 2 is, therefore, answered accordingly.

This opinion should not be construed as precluding a committing magistrate from receiving fees other than the flat fee referred to above for services performed in connection with criminal actions and proceedings. A justice of the peace, for example, is entitled to the same fees as those payable to the clerk of the circuit court for similar services under the provisions of §81.26 (2), F. S., which clerks' fees are set forth in §28.24, F. S.

060-93—May 6, 1960

# INSURANCE

INSURANCE PREMIUM CREDIT PLAN—§625.19, F. S., 1957;  
§§626.0613 AND 624.0403, F. S., 1959; CH. 59-205

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

## QUESTION:

May an insurance agent under the Florida insurance code finance fire and casualty insurance premiums on a monthly installment basis and make the proposed service charge?

In A. G. O. 056-342, page 935 of the 1955-1956 biennial report of the attorney general, Dec. 10, 1956, this office, with certain restrictions, held that an *insurance company's* plan for financing premiums due under issued contracts was legal. Said opinion raises the point that the use of a pro rata method of premium repayment upon the cancelling of policies for failure to make an installment payment would result in more favorable treatment to a person under the finance plan than would be accorded by the short-rate basis premium repayment given a person who had paid cash for his policy and then cancelled the same, and that such distinction would be a rate discrimination. This objection was overcome by the company's adopting a provision that those who were under the finance plan and had their policies cancelled would also be charged on a short-rate basis.

It was also pointed out in opinion 056-342, *supra*, that the corporate powers to finance premiums must be derived from the corporate charter and the laws relating to insurance companies. In the instant case, where the insurance agent is acting as an individual, his powers are independent of any corporate charter.

The applicable law prohibiting inducements by insurance companies and agents which was in effect at the time of opinion 056-342, *supra*, was §625.19, F. S., 1957, which says:

No insurer, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement for insurance on any risk in this state now or hereafter to be written, any rebate of, or part of the premium payable on the policy, or on any policy, or of agent's commission thereon, or earnings, profit, dividends or other benefits founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration or inducement to or for insurance which is not specified, promised or provided for in the policy contract of insurance. (Emphasis supplied.)

No direct prohibition against extending credit appears in said statute. Opinion 056-342, *supra*, held that the extension of credit with an adequate interest rate would not constitute an inducement for insurance within the prohibition of said section. However, the applicable law has since been changed by Ch. 59-205, §392, now appearing as §626.0613, F. S., 1959, which states:

(1) No property, casualty or surety insurer or any employee thereof, and no agent or solicitor shall pay, allow, or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, or after insurance has been



effected, any rebate, discount, abatement, *credit* or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, *or any valuable consideration or inducement whatever*, not specified in the policy, except to the extent provided for in an applicable filing with the commissioner as provided by law. (Emphasis supplied.)

The word "credit" may signify an entry on the credit side of a book of account or such word may indicate an extension of time for payment of the purchase price of goods or property sold by one person to another (State v. Stout, W. Va., 95 S.E. 2d 639, 643, 59 A.L.R. 2d 1154).

Examination of §626.0613, *supra*, leads but to the conclusion that the word "credit" is used in said section to denote a diminution of the premium normally charged for particular insurance coverage. Thus the word "credit" is not a prohibition against an extension of time for the payment of premiums on policies of insurance. Section 626.0613, *supra*, does contain an expressed prohibition against agents giving "*any valuable consideration or inducement whatever*." (Emphasis supplied.)

This raises the question as to the procedures which an agent may use in connection with insurance policy premium finance plans. If a plan can in any way be considered as either the giving of a valuable consideration or an inducement to purchase insurance from a particular agent, unquestionably under §626.0613, *supra*, it would be prohibited. For example, if an agent made available to purchasers of insurance an installment premium finance plan as a part of his insurance business and charged a reasonable rate of interest or carrying charge in connection with such plan, I do not believe the prohibitions against giving valuable consideration or inducements would be applicable. However, if the particular plan was without interest or carrying charge it would appear to be violative of the statutory prohibition.

I point out that each particular plan of premium financing which an agent undertakes will, upon inspection, stand or fall on its own merits. Involved in this problem is the matter of the agent's contract with his company as to whether or not such plan is permitted because of the agency contract terms relating to premiums collected from policyholders as trustee accounts. Perhaps the best procedure to be followed would be for the agent to finance his premium accounts through a separate corporate entity organized solely for that purpose, thus assuring that no particular valuable consideration or inducement has been offered by the agent to secure insurance business. Such procedure would be proper so long as it was not used by the agent to do indirectly that which he could not do directly.

Where premium finance plans are a part of a company's filing approved by the insurance commissioner, agents of companies having such approved plans would be authorized to extend premium finance plans to policyholders on behalf of such company in accordance with the plan filed and approved.

The term "property insurance" as used in the above act includes fire insurance as shown in §624.0403, F. S., 1959.

The foregoing comments answer your question as well as possible without specific and detailed information of all facts of a particular plan being presented for consideration.

060-94—May 9, 1960

# TAXATION

CHARITABLE INSTITUTIONS, HOSPITALS—TAX EXEMPTION, HOUSING FOR PERSONNEL—§1, ART. IX AND §16, ART. XVI, STATE CONST., §192.06(3), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

## QUESTION:

Where a hospital is entitled to tax exemption as a charitable institution devoted to charitable purposes, does this exemption extend to housing for hospital personnel where the personnel occupying such housing pays a rental only designed to "pay for the maintenance and repairs"?

As your question seems to be directed to the question of the tax exemption status of the housing facilities mentioned in the above stated question, and not to the hospital building itself, we are presuming that the hospital building itself is within the rule of *Orange County v. Orlando Osteopathic Hospital, Fla.*, 66 So. 285, and the authorities therein cited and discussed, and that the hospital itself is devoted to charitable purposes within the purview of §1, Art. IX, and §16, Art. XVI, State Const.

Although not specifically applicable to hospital personnel, the court in the *Orlando osteopathic hospital case*, supra, stated that "a charitable institution does not lose its charitable character and its consequent exemption from taxation merely because recipients of its benefits, who are able to pay, are required to do so, where funds derived in this manner are devoted to the charitable purposes of the institution." The general rule seems to be that where property is rented or leased for revenue, by a charitable institution, that there is no exclusive charitable use entitling it to tax exemption (Annotations 34 A.L.R. 659, 62 A. L. R. 334 and 108 A.L.R. 292).

Although hospital personnel is not required to reside in the housing in question, the hospital found "it necessary to have a certain amount of housing available in order to get the nurses and other personnel necessary for the operation of our hospital." The personnel residing in the said housing is "charged enough rent to pay for the maintenance and repairs," ranging from \$28 per month for a two bedroom house to \$32.50 for a three bedroom house.

Section 192.06 (3), F. S., provides that such property of charitable institutions within this state as shall be actually occupied and used by them for charitable purposes shall be exempt from taxation, "provided, not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for educational, literary, benevolent, fraternal or charitable purposes of said institutions." In *Fellowship Foundation v. Paul, Fla.*, 86 So. 808, text 810, it was stated that the rental of rooms in a charitable home for the aged was not necessarily fatal to the contention that the property was used for a charitable purpose within the purview of said §192.06 (3). (See also *State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16, upholding said §192.06 (3).

In 84 C. J. S. 622, §297, it is stated that "in applying the general rules stated (84 C. J. S. 617-620, §297) to particular laws and facts involved, "exemption has been granted to farms, investments, a building used for printing forms used by a hospital, a home

for student nurses, and residential properties occupied by hospital employees, . . ." "Dwellings of an educational institution reasonably necessary for institutional use are ordinarily exempt when employed as residences by employees of such educational institution, such as teachers and faculty members, and such as administrative officers. However, exemption has been denied where the residence is not reasonably essential" to the operation of the school or college (84 C. J. S. 853, §288).

In the light of the above statutes and authorities the above question is answered in the affirmative; provided the tax assessor finds that the housing is reasonably essential to the operation of the hospital and is used in that light and that the rentals paid for such housing is itself used for the maintenance of the hospital and its facilities (including such housing) and not for other than charitable or other purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. Otherwise no tax exemption may be allowed.

060-95—May 12, 1960

**FLORIDA CRIPPLED CHILDREN'S COMMISSION  
AUTHORITY TO OPERATE ON CHILD—DETERMINATION  
OF GUARDIAN—TORT LIABILITY—§§744.13, 744.14,  
744.03(1),(5),(6); §22, ART. III, AND §4,  
DR, STATE CONST.**

To: E. L. Matta, Jr., Director, Florida Crippled Children's Commission, Tallahassee

**QUESTIONS:**

1. Is the Florida crippled children's commission program liable for medico-legal action if a patient under its care is operated on without a permit signed by the parents authorizing such a procedure?

2. Who is considered the legal guardian of a minor according to Florida Statutes?

3. In the absence of the father, as the head of the household, can the mother assume legal guardianship over her child and be legally authorized to sign the operative permit?

4. Is the signature of both father and mother required on the operative permit?

5. In the absence of a father or mother, how are we to determine or establish the person who is the legal guardian of the child in order to secure a signed operative permit?

6. In the absence of a legal guardian, the child urgently requiring an operative procedure (not immediately life saving) for a condition which will be aggravated the longer its correction is postponed, can the Florida crippled children's commission legally proceed to operate on the child on the basis of the attending surgeon's recommendation?

Section 744.13, F. S., provides, among other things:

(1) The mother and father jointly are natural guardians of their own children and of their adopted children during infancy. If one parent dies, the natural guardianship shall pass to the surviving parent, and such

right shall continue even though the surviving parent remarries. In the event of a divorce between the parents, the natural guardianship shall belong to the parent to whom the custody of the children was awarded. If the parents are given joint custody, then both shall continue as natural guardians. In the event a divorce is granted, and neither the father nor the mother is given custody of the children, then neither can act as natural guardian of the children. The mother of an illegitimate child is the natural guardian of such child.

Section 744.14, F. S., provides that:

A surviving father or a surviving mother may by will name a guardian for the person of his or her minor child to serve during such child's minority or any part thereof. Such guardian shall be subject to the provisions of law in the same manner as other guardians.

Section 744.03(1), F. S., defines a guardian as "one to whom the law has entrusted the custody and control of the person or of the property, or of both, of an incompetent. . . ."

Section 744.03(5), F. S., defines an incompetent as "any person who, because of minority . . . is incapable of either managing his property or caring for himself, or both."

Section 744.03(6), F. S., defines an infant or a minor as a "person under twenty-one years of age whose disabilities have not been removed by marriage or otherwise according to law."

#### AS TO QUESTION 1:

I call your attention to my opinions 060-81, 059-31 and 049-473 relative to the liability of state agencies for acts of its employees, as well as the liability of state employees for acts committed beyond the scope of their employment. The same reasoning and conclusions which would substantially apply to tort liability of the Florida crippled children's commission may be summarized as follows:

*The crippled children's commission, as an agency of the state, is not liable for tort and may not be sued in tort in the absence of express legislation authorizing such suits adopted pursuant to §22, Art. III, State Const. The state and its agencies are not liable for injuries arising from neglect or other tortious acts of conduct of its officers, agents or servants, committed in connection with the performance of their obligations and duties.*

*Members of the crippled children's commission are not liable in tort for injuries arising from their actions done within the scope of their authority and by virtue of office, but would be liable for injury due to actions beyond the scope of their authority. The same rule would apply to the director, and all other employees of the crippled children's commission.*

Any legislation purporting to relieve the director and employees of the crippled children's commission from tort liability in connection with their employment or duties would be of questionable validity, because of §4 DR., State Const., except as to punitive damages.

#### AS TO QUESTION 2:

It is my opinion that the foregoing sections of the Florida Statutes clearly define the legal guardian of a minor in the following circumstances:

- (1) The mother and father jointly if living, otherwise to the survivor.



(2) In case of divorce, the parent or parents to whom custody is awarded.

(3) The guardian appointed either by the court or by the last will and testament of the surviving mother or father.

Question 2 is answered accordingly.

AS TO QUESTIONS 3 AND 4:

It is my opinion that both the signature of the mother and the father are required, if obtainable. However, if one or the other could not be reached for signature, he or she should be notified.

AS TO QUESTION 5:

Replying to question 5, you may determine who is the legal guardian of the child by contacting the person who has custody of the child and request a certified copy of the order of guardianship; or a request for a copy of the order of guardianship may be made directly to the county judge of the county wherein the child resides or it is believed that the order of guardianship was issued.

AS TO QUESTION 6:

It appears that in the absence of a legal guardian that the person who takes the child into his home and treats it as a member of his own family, educating and supporting it, stands to the child as "loco parentis" and may sign the operative permit.

39 Am. Jur. 61, p.698, provides, among other things:

Where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, substantially the same as between parent and child, although, of course they may be enlarged or restricted by legislative enactment.

(See also 24 Fla. Jur., §17, p. 159.)

I trust the foregoing will be of some help to you.

060-96—May 13, 1960.

### TAXATION

LICENSES AND LICENSE TAXES—NURSERIES—EXHIBITIONS—AMUSEMENTS—CH. 205; §§205.01, 205.49 AND 205.53, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the operator of a plant, shrub, vine, tree, etc., nursery, who is duly licensed under §205.53, F. S., has and maintains within the nursery grounds an area where rare plants, shrubs, trees and other things of interest are exhibited for an admission fee, is a separate or additional license required for such area?

Section 205.01, F. S., provides in part that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or any other law of this state, unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured . . ." Numerous sections of Ch. 205, F. S., specify licenses for particular businesses, professions and occupations, with §205.49, providing that "every person engaged in the operation of any business of such nature that no license can be properly required of it under any other provision of this chapter, or other law of the state, shall pay a license tax of one hundred dollars . . ." This

seems to bring us to the question of whether or not the special and separate exhibition of rare plants, shrubs, trees and other things of interest for which a special admission fee is charged, is, of and within itself, a taxable business, separate and apart from the nursery, which is licensed under §205.53, F. S.

"The term 'business' as used in a law imposing a license tax on businesses, trades, professions and callings means a business in the trade or commercial sense, one carried on with a view to profit, or livelihood." (Texas Co. v. Amos, 77 Fla. 327, 81 So. 471, text 472; see also Harper v. England, 124 Fla. 296, 168 So. 403, text 406 and 53 C. J. S. 556, §27). "'Business' is a word of large significance, and denotes the employment or occupation in which a person is engaged to procure a living." The word is defined by Webster as "that which occupies the time, attention, and labor of men for the purpose of profit or improvement." (Texas Co. v. Amos, supra). We come next to the question of whether the special exhibition of rare plants, shrubs, trees and other things, for which an admission charge is made, known and designated as "The Oaks," is subject to separate classification from the nursery for license tax purposes.

In Bentley-Gray Dry Goods Co. v. Tampa, 137 Fla. 641, 188 So. 758, the court said that "where one comes under more than one valid classification for the payment of excise tax . . . he may be required to pay a tax on each classification into which he falls." "So where several separate and distinct occupations or privileges or classes thereof are pursued or exercised, a separate license tax may be imposed for each occupation, privilege, or class, notwithstanding the occupations are combined, or the privileges exercised, in one general business" (53 C. J. S. 550 §24). Where a person operates both a wholesale and a retail business at a single location, he may be required to pay both a wholesale and a retail license tax, this because "the business of selling at retail and the business of selling at wholesale are radically different in character, and the legislature has the power, which it has exercised, to classify them separately" (Florida Sugar Dis. v. Wood, 135 Fla. 126, 184 So. 641, text 645). "The mere fact that the business of the plaintiff may be taxed under two or more different classifications will not thereby invalidate the tax on such business, either on the ground of double taxation or any other ground." (Smith v. Miami, 160 Fla. 306, 34 So. 2d 544, text 548). In Brown Plumbing and Heating Co. v. McDowell, 240 Ala. 485, 200 So. 104, text 105, it was held that concerns engaging in two or more businesses, although under the same ownership and management, and at the same location and in the same store room, for which a license tax is imposed by statute on each such business, each license tax must be paid, not merely one. In Fort Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 91 A. S. R. 100, 58 L. R. A. 921, it was held that two license taxes were due where a motor vehicle came within the purview of a general taxing law and also under a statute taxing motor vehicles used for specified purposes.

This opinion involves a nursery establishment and grounds, upon which is located display areas, rooms, etc., for rare plants, shrubs, trees, etc., separated from the nursery grounds proper, for the purpose of displaying such plants, shrubs, trees, vines, etc., to the general public for an admission fee. No fee is charged the public as an admission to the nursery grounds other than such areas, rooms, etc. A substantial admission fee is charged for

such admissions. The area maintained for display for a fee is designated as "The Oaks." Only one set of account and record books is kept and maintained; all purchases and sales are made in the name of the nurseries; both are owned and maintained by the same parties; to reach "The Oaks" one must pass over the grounds of the nurseries; plants, shrubs, trees, vines, etc., are supplied "The Oaks" by the nursery without charge; the Oaks is a convenient display of the nursery stock for sale. It is claimed that the admission fees collected do not cover the expenses of operation, maintenance, etc., of "The Oaks," and that the difference between the admissions paid and such expenses is absorbed by the nursery. This leads to the question of whether two or only one business, within the purview of Ch. 205, F. S., is involved. If there are two businesses within the purview of said Ch. 205, then two licenses must be obtained and two license fees paid. The fact that an admission charge is made of those wishing to inspect or go through "The Oaks" raises a presumption that it is maintained as a business separate and apart from the nursery itself. If the primary purpose of "The Oaks" is the display of plants, shrubs, trees, vines, etc., held for sale to the public then no admission fee would ordinarily be charged. We may construe the file as indicating that the nursery is maintained for the purpose of commercial sale of plants, shrubs, trees, vines, etc., while "The Oaks" is maintained as a business of exhibition and display for a fee. Although the purpose of "The Oaks" may well include the display of plants, shrubs, trees, vines, etc., for commercial sale, it seems that the primary purpose of its existence is the collection of admission fees, although such collections may not pay all costs and expenses of maintenance, replacements, etc. All these observations raise a presumption that "The Oaks" is maintained as a business for the production of revenue.

Should the tax assessor, upon further investigation find the presumptions indulged in in the preparation of this opinion are true in fact, then the above question should be answered in the affirmative.

060-97—May 16, 1960

# REGULATION OF PROFESSIONS AND VOCATIONS BEAUTY CULTURE, PRACTICE OF—TRADE OR OCCUPATION

To: *Ethel M. Manning, Executive Secretary, State Board of Beauty Culture, Tallahassee*

## QUESTION:

**Is there any Florida law or standard which designates the practice of beauty culture a profession rather than a trade?**

My search fails to find any Florida law or any ruling of the Florida Supreme Court which specifically designates the practice of beauty culture to be either that of a trade or profession.

However, in an effort to be helpful to you, I make the following observations:

In 24 Fla. Jur., §2, p. 11, relating to occupations, trades and professions, we find the following:

*An occupation is that which occupies or engages a person's time or attention and is the principal business of his life. A trade is a business of selling or exchanging*

some tangible substance or commodity. A *profession* is a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. (Ballentine's Law Dictionary, 2nd Ed.) (Emphasis supplied.)

In 72 C. J. S., pp. 1215-1216, relating to professions, we find, among other things, the following:

It has been said that it is difficult, if not impossible, to lay down any strict legal definition of the word "profession," and that the term may, perhaps, be best understood by mention of some prominent or characteristic elements, rather than by an attempted complete definition. The word is vague, and neither static nor rigid, and is used in many different senses, and in one sense it means a public declaration respecting something, and in a somewhat different sense it means that of which one professes knowledge. However, the word "profession" is more commonly employed in the sense of vocation, business, calling, or occupation, . . .

While the word "profession" may be broadly defined as meaning vocation, calling, occupation or employment, *literally, the term is applied to a calling or vocation requiring special knowledge of a branch of science or learning*, and in this somewhat restricted sense the word "profession" means an employment requiring a learned education, as, a profession of arms, the profession of a clergyman, lawyer, or physician, the profession of chemistry or physics.

On p. 1219 of 72 C. J. S., we note the following:

. . . beauty culturists . . . have been held *not* to be engaged in the practice of a profession." (Peeple v. Maggi, Ill., 33 N. E. 2d, 925-928).

In Gillett v. Florida Univ. of Dermatology, 197 So. 855, our supreme court of Florida said, among other things:

The Legislature has the power to regulate trades or professions operating directly on the person, . . . and especially is this true *as to the occupation of a barber or beauty culturist*. (Emphasis supplied.)

Vol. 7, Am. Juris., pp. 613, 614, par. 2, treating these occupations, says:

Generally.— . . . The occupation of barber or beauty culturist is embraced in this general principle; it is a lawful business, *yet it is an occupation*, which, because of its intimate relation to the public health, is within that class of *trades, professions, or callings* which may, under the police power be regulated by law without depriving a citizen of his natural rights and privileges guaranteed by fundamental law; . . . (Emphasis supplied.)

In the same case our court referred to the "*barbers' trade*." In Peeple v. Logan, Ill. 119 N. E., 813, 914, the Illinois court also referred to the "trade" of a barber.

In Peeple v. Maggi, supra, the supreme court of the State of



Illinois in holding that the *practice of beauty culture was a trade or business*, said:

It would seem that the chief difference between barbers and beauty culturists is that the former are principally men and perform on the persons of men, while the latter are principally women and perform on the persons of women such services as needed by them; otherwise there seems to be no marked difference between the two occupations. . . .

I trust the foregoing observations will be of some help to you.

060-98—May 16, 1960

**PUBLIC OFFICERS AND EMPLOYEES**  
EXPENSE ACCOUNTS—CENTRAL AND SOUTHERN FLORIDA  
FLOOD CONTROL DISTRICT—§378.15(3), F. S.

To: G. E. Dail, Jr., Executive Director, Central and Southern  
Florida Flood Control District, West Palm Beach

**QUESTION:**

Is a board member of the central and southern Florida flood control district entitled to receive the statutory travel and expenses allowances for travel performed from an out-of-state location to the site of a regularly scheduled board meeting, and return transportation and expenses to that same out-of-state location?

Section 378.15 (3), F. S., provides that:

The chairman and members of the board shall receive no compensation for such services, but *while officially on work for the district* shall receive their actual traveling expenses not to exceed the rate of .07½¢ per mile, and for subsistence and lodgings not to exceed \$15 per day, and for other expenses in the actual amount incurred therefor. (Emphasis supplied.)

The various boards, bureaus, legislative committees, agencies, etc., of the state ordinarily consider travel between the official residence of a member of such board, bureau, etc., and the site of an official meeting as "official work" for which a board member may be reimbursed for his out-of-pocket expenses.

The above-quoted question raises the additional question of the legality of out-of-state travel and per diem expense in the face of the statutory requirement that members of the board of governors shall reside in the district (§378.13, F. S.), and the constitutional provision that persons holding positions of trust under the laws of the state shall devote their personal attention to such duties (§17, Art. XVI, State Const.)

Situations can be foreseen when a member of the board would unavoidably be out of the state and his individual presence would be necessary for the proper conduct of the board's business. In this event the legality of per diem and travel expense would depend upon whether the expense could be justified as "necessary" for the proper conduct of the board's business.

My predecessor in office held in opinion 047-219, dated July 24, 1947, that "in order to be considered legal expense accounts must conclusively show that *they were incurred strictly for county purposes.*" (Emphasis supplied.)

In A. G. O. 055-232, issued Sept. 8, 1955, I held that any

committee member or officer of the legislature charged with the duty of approving requisitions for the payment of per diem and travel expenses should not approve same unless and until satisfied that such per diem and travel expenses are proper and that the state comptroller should be justified in accepting such approval as a certificate that such payments are proper and due.

In A. G. O. 056-273, issued Aug. 31, 1956, I held that when a legislative interim committee finds and determines that it cannot complete the duties imposed upon it by a resolution without going beyond the boundaries of the state and/or without holding hearings beyond the boundaries of the state, then it may carry its studies and investigations into other states, territories, and countries.

67 C. J. S., Officers, §91, states in part that: Where a public duty is demanded of an officer without provision for any compensation, the expenses must be borne by the public for whose benefit it is done. However, in order to justify indemnification of a public officer for an expense incurred in the discharge of his official duties, *the officer must have acted in good faith, in the discharge of a duty imposed or authorized by law, and in a matter in which the government has an interest.*

In the final analysis the burden for justifying the necessity of travel expense and per diem for a member of the board to travel from an out-of-state location to a board meeting and back to the out-of-state location must be based upon the particular situation. Undoubtedly, there is a presumption that such expense could be foregone by the board member arranging his affairs so as to properly carry out his duties and obligations to the district without incurring the additional expenses. It seems equally true that there should be an obligation upon the board to conduct its affairs so that its work could be carried on without disruption if a member of the board is out of the state temporarily. However, if a member is unavoidably out of the state temporarily and his immediate presence is vital to the conduct of the board affairs, it is my opinion that such travel expenses and per diem may be paid.

In order that the official records of the board shall disclose its control over travel reimbursements covered by your question, the approval of the board and the facts and circumstances justifying such travel should be spread upon the official minutes. A certificate of such approval should be attached to the travel voucher.

As qualified, your question is answered in the affirmative.

060-99—May 16, 1960

#### TAXATION

LICENSES AND LICENSE TAXES—DALE CARNEGIE COURSES, FLORIDA INSTITUTES—§§205.01, 205.55, F. S.; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are those persons or corporations maintaining and presenting the so-called Dale Carnegie courses in this state operating schools within the purview of §205.55, F.S., and required to obtain licenses thereunder?

Section 205.55, F. S., provides that "every person engaged in the business of operating a school, college, or other educational or

training institution for profit shall pay a license tax of ten dollars for each place of business, except that persons giving lessons or instructions in their homes without assistants or a staff shall not be required to pay a license." Under §205.01, F. S., "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless a state license, or a state and county license, or a county license, as the case may be shall have been procured . . . ." The term "business" as used in said §205.01 was discussed by the court in *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, and held to mean a "business in the trade or commercial sense, one carried on with a view to profit or livelihood." See also our opinion of Oct. 7, 1959 (059-204). Under said §205.55, schools operated for profit are subjected to taxation.

If the Dale Carnegie courses are operated in this state as schools, colleges, or other educational or training institutions *for profit*, then they are within the purview of said sections of the statutes and liable for the taxes imposed by said §205.55, F. S.

We have before us a copy of a newspaper advertisement evidently run at the request of Florida institute, an enrollment card form for enrollment for the Dale Carnegie course, on which appears a list of ten things "the Dale Carnegie Course will help you do." A tuition fee of \$140 is made for the course. The corporate records in the office of the secretary of state reflect corporate papers qualifying Dale Carnegie, Inc., a New Jersey corporation, for the transaction of business in this state. The expressed powers of this corporation seem to be the fostering, advancement and encouragement of the art of public speaking, and the development of courage and self-confidence, etc. It seems clear that the Dale Carnegie courses, as described in said advertisement and enrollment card are schools, colleges, or other educational or training institutions within the purview of §205.55, F. S., and subject to the license taxes thereby imposed, *if operated for profit*.

The term "for profit" has reference to any accession or increment of labor, management, or other industry and may be tangible or intangible (see *Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608, text 609). In the *Miami Beach College* case the uncontradicted evidence showed an income of \$7,521.15 in tuition, "less the sum of \$462.25 secured in the form of a loan, that \$2,922.60 of this amount was paid to the employees in the form of salaries and that the balance was disbursed in the form of janitor's pay, directors' salaries, and other expenses, and that the school showed a deficit of \$1,416.12 for the school year." This was held insufficient to show that the operation was a non-profit operation so as to be exempt under §205.55 F.S. The view of the court seems to have been that the fact that a corporation made no profit during a particular period of time did not prevent its being a corporation for profit within the purview of said §205.55. The incorporation of an educational institution under state statutes for the incorporation of nonprofit corporations is not decisive of the question of whether the same is operated for profit or not (see *Miami Beach College Corp. v. Tomlinson*, *supra*). The constitutional tax exemptions provided for by §1, Art. IX, and §16, Art. XVI, State Const., relate to ad valorem taxes, but not to licenses and license taxes.

The above question is, therefore, answered in the affirmative;

unless satisfactory evidence be produced before the taxing authorities that the institutions are not operated as for profit institutions but strictly as nonprofit institutions. An institution may be one organized and existing for profit, although it may fail to make a profit for one or more years of its operation.

060-100—May 20, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
SPECIAL DEPUTIES—RESIDENCE REQUIREMENTS—  
§§112.02, 30.09(4)(c), 122.02(1) AND 122.08; CH. 122, F. S.**

To: *Thomas J. Kelly, Metropolitan Sheriff, Dade County, Miami*

**QUESTION:**

**May an individual be appointed a special deputy who has not been a bona fide resident of the state for at least two years prior to the appointment?**

Section 112.02, F. S., states that:

All persons employed to work for the state or for any county of the state, shall be bona fide residents of the state for two years next prior to such employment, except only where after due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment.

Section 30.09(4)(c), F. S., refers to the appointment of special deputies: "For specific guard or police duties in connection with public sporting or entertainment events, not to exceed thirty days; or, for watchman or guard duties, when serving in such capacity at specified locations or areas only."

In A. G. O. 042-374, issued Aug. 1, 1942, my predecessor in office held that: "There does not seem to be any question but that the sheriff has the authority to appoint deputies for private concerns with the understanding that their salaries will be paid by such users, it being, of course, their sole duties as such deputies, to protect the property of the private concerns."

Patently, if the special deputies appointed pursuant to the provisions of §30.09, F. S., come within the purview of §112.02, F. S., as a person "employed to work for the state or for any county of the state," then the residence requirements of §30.09, *supra*, are applicable.

Chapter 122, F. S., pertains to the state and county retirement system. The following definition for a state or county officer or employee under such system is contained in §122.02(1):

"State and county officers and employees" shall include all full-time officers or employees who receive compensation for services rendered from state or county funds . . . for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; *provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries* by the employing state or county agency or state or county official and shall not include amounts allowed for professional employees for special or particular services or for subsistence or traveling expenses. . . . (Emphasis supplied.)

Section 122.08(2)(b), states as eligible for retirement: "Any



county officer or employee who has served as sheriff or a full-time deputy sheriff for the last ten years or more of his employment and has attained the age of fifty or more . . . ." (Emphasis supplied).

Under the provisions of this chapter, the special deputy appointees you describe would not qualify as state or county officers or employees.

I understand that the special deputy commissions requested are for security personnel for stores, shopping centers, banks and industrial plants. I assume, for the purposes of answering your question, that the special deputies are to receive no pay or remuneration of any kind from the sheriff's office, the metropolitan government or the state; that the relation between the sheriff's office and the special deputy is merely a delegation of the authority to exert police power within the confines of their individual employer's property; that they will neither be called upon, nor allowed, to perform any of the ordinary functions of the sheriff's office, such as serving process, transferring prisoners, etc., and that, in short, the appointment of the special deputies will not result in an indirect substitution of their services for those normally performed by a state or county employee.

It is my opinion that a special deputy, as qualified by the foregoing paragraph, does not come within the legislative intent of a state or county employee and, therefore, your question is answered in the affirmative.

060-101—May 31, 1960

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
CONSTRUCTION OF CH. 315, F. S. (59-411), PORT FACILITIES FINANCING LAW—§§315.02, 315.03, 315.13, F. S.

To: William B. Leath, County Attorney, Bay County, Panama City  
QUESTIONS:

1. May a board of county commissioners by resolution, create a port authority and appoint members thereon other than themselves?

2. May a county pledge a portion or all of its race tax revenues as security for revenue certificates issued in connection with a county port authority?

3. Considering the broad delegation of powers by the legislature to the counties, does your office entertain any doubt as to the constitutionality of Ch. 315 or any part thereof?

AS TO QUESTION 1:

There is serious doubt that the board of county commissioners may, by resolution, create a port authority and appoint members thereon other than themselves because §§315.02, 315.03, and 315.13, F. S., appear to confer directly upon the governing body of the political subdivision, viz., the county commissioners, certain powers in connection with the operation of port facilities without additional legislative authorization to delegate such powers to other administrative boards.

The above is so because in this state it is well settled that the board of county commissioners have no powers other than those expressly vested in them by statute or that must be necessarily implied to carry into effect those expressly vested, and

*their governmental powers can not be delegated* (Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d 638).

However, the board of county commissioners, in order to be properly and completely advised, in the exercise of the powers and authority conferred on them by Ch. 315, F. S., could appoint *such advisory boards* as deemed necessary.

I point out that the purpose of this chapter is to confer additional powers upon counties, port districts, port authorities and municipalities in the state with relation to harbor and port facilities; to authorize and empower such counties, districts, authorities and municipalities to acquire, construct, lease, operate, maintain, mortgage, sell or exchange port facilities (Ch. 59-411, title thereto).

Section 315.15, F. S., defines the powers conferred by Ch. 315 as additional and alternative methods for the doing of those things authorized by said chapter and is to be considered supplemental and additional to powers conferred by any other law and is not to be regarded as an interrogation of any existing powers. Thus, where the legislature has established or designated a particular board of a political subdivision to operate port facilities, the powers set forth in Ch. 315 would flow to that board rather than to the governing board of the political subdivision wherein the port facilities were located.

Question 1 is answered in the negative.

#### AS TO QUESTION 2:

Under the provisions of §15, Art. IX, State Const., the legislature is empowered to allocate excise taxes levied and collected from the operation of pari mutuel pools to the several counties of the state. Such taxes, allocated and distributed to the various counties, become county funds to be expended for county purposes (City of Lynn Haven v. Bay County, 47 So. 2d 894).

A legislative allocation of race track funds to the Liberty county port authority has been upheld as a valid appropriation of such funds for a county purpose. The Florida supreme court has also held the construction and operation of port facilities to be a county function (Kirkland v. Phillips, 106 So. 2d 909). Although Ch. 315 fails to expressly authorize the pledge of county race track funds in connection with financing port facilities constructed or operated under said chapter, §315.14 declares all powers conferred by this chapter to be proper public and municipal purposes. The chapter is also to be liberally construed to effect the purposes intended (§315.16, F. S.).

In view of the above constitutional provisions, statutes and authorities, it would appear that the governing body of the county would be authorized to pledge county race track revenues as security for revenue certificates issued in connection with a county port facility. I point out, however, that any such pledge would, of course, be limited to those race track funds presently unallocated by the legislature for a specific purpose, or those which have not been included in the county budget for other purposes. Question 2 is answered accordingly.

#### AS TO QUESTION 3:

It has long been the policy of this office to refrain from commenting on the constitutionality of acts of the legislature and to leave such questions for judicial determination. In view of this policy, I respectfully decline to answer question 3.

060-102—June 9, 1960

## INSURANCE

REFUNDS; EXAMINATION FEE, STATE AND COUNTY LICENSE TAX, APPOINTMENT FEE, TEMPORARY LICENSE FEE, NONRESIDENT LICENSE FEE—§§624.0300, 624.0320, 626.0112, 626.0113, 626.0214, 626.221, 626.231(1) and 626.291(5), F. S.

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

## QUESTIONS:

Are the following fees and taxes subject to any type of refund or return:

1. Filing fee for examination to secure agent, solicitor, or adjuster license?
2. State and county license tax for various agents licenses?
3. Appointment fee?
4. Temporary license fee?
5. Nonresident license fee?

A refund is generally defined as "money paid back after remitted or collected; a return of money previously paid" (76 C. J. S. Refund, pp. 505-6). Further, a refund would appear to imply that money has actually been received and properly receipted for.

... In absence of statutory authority, no executive or administrative officer or board has the power to refund taxes; and if power is given to him or it by law, it must be strictly followed ... (84 C. J. S. Taxation, §632, p. 1265).

Recovery of license fees or taxes, if permitted at all, is generally based upon the illegality of the tax, an erroneous payment, or where person or property is exempt (84 C. J. S., supra, pp. 1267-8). Under the provisions of §624.0320, F. S. (Florida insurance code, Ch. 4, §94) an "insurance commissioner's clearing account" has been created for the purpose of depositing moneys received by him, and "for the return to the remitter of any moneys received in error or overpayment under the provisions of this code."

## AS TO QUESTION 1:

Section 626.271(1), F. S. (Florida insurance code, Ch. 9, §206), provides for the payment by an applicant of an examination application fee "at the time of filing his application for license." Section 626.271(2) further provides that "*the fee for filing application for examination shall not be subject to refund.*" (Emphasis supplied.)

Under the provisions of §626.231(1), F. S. (Florida insurance code, Ch. 9, §202), the payment of the examination fee is a condition precedent to the taking of such examination and must be "received by the commissioner in advance of the applicant's appearance for the examination."

The foregoing sections indicate that the examination fee is earned upon the filing of the application for examination. Although it is true that the examination fee necessarily relates to the performance of duties by the commissioner with respect to

his processing of applications for examination and his giving of the same, and may be in the nature of a regulatory tax, nevertheless, it would appear from the wording of the foregoing statutes that the examination fee is also somewhat in the nature of a revenue tax which is immediately earned upon payment thereof. In any event, whether the examination fee is classified as a regulatory or revenue tax, the wording of the above quoted provisions indicates the fee is earned when the application is filed and that said fee shall not be subject to refund.

The only apparent provision which would appear to qualify the nonrefundability of examination fees is contained in §626.221(4), F. S. (Florida insurance code, Ch. 9, §201(4)), which provides that "no fee for filing application for examination shall be payable as to any applicant for license exempted from examination under this section." If a fee was paid by an exempt applicant, which fact was not determined until after such fee was paid, the preceding provision would appear to authorize a refund under such circumstances. In absence of a statutory revision authorizing a refund of said examination fee except as pointed out immediately above, no refund of such fee can generally be made except where an error or overpayment has occurred (see §624.0320, *supra*). Payment of duplicate fees would appear to be an error or overpayment justifying a refund. Where a request for withdrawal of the examination fee is received prior to the receipt of such examination fee by the commissioner's office, the commission will be authorized to return such fee; no question of refund arising since there has been no actual receipt.

Question 1, therefore, is answered in the negative subject to the above qualifications.

#### AS TO QUESTION 2:

Under the provisions of §624.0300, F. S., (Florida insurance code, Ch. 4, §74), applicants for licenses for general lines agents, solicitors, life insurance agents, disability insurance agents, etc., are required to pay a state and county license tax prior to the issuance of their respective licenses. After an applicant has complied with the various rules and regulations of the insurance code regarding qualifications, examinations, etc., the insurance commissioner will issue said license. Under the provisions of §626.291(5), F. S. (Florida insurance code, Ch. 9, §208(5)), it is provided that:

*Upon denial of a license the commissioner shall refund to the applicant or payer entitled thereto any state license tax and county license tax received by him in connection with the application for the license. No such refund shall be made under any circumstances after issuance of a license if the applicable license year has commenced before receipt by the commissioner of the request for cancellation of license and refund at his office at Tallahassee. (Emphasis supplied.)*

Examination of the various provisions of the insurance code indicates that no other provision is made for the refund of the state and county license tax once said license has been issued, except that a refund would be authorized in case of error or overpayment.

Question 2 is therefore answered in the negative subject to the above qualifications.



## AS TO QUESTION 3:

Under the provisions of §624.0300, F. S., 1959, an applicant for a license for a general lines agent, solicitor, life insurance agent, disability insurance agent, etc., is required to file with his application an appointment fee of \$1 in addition to the other taxes and fees provided for under said section.

The appointment fee provided for in §624.0300, supra, formerly appeared in §205.45(5), F. S., 1957, and was referred to at that time (prior to its repeal in 1959), as a "qualification tax" and was required to be filed by the insurer for each agent appointed by, representing, or acting for such insurer in this state. This "qualification tax" as well as the appointment fee in the instant situation relates to the filing of an application for an agent's license. It would appear to be analogous to the filing fee paid upon the recordation of instruments which, once paid, is generally not refundable. The fee covers the initial receipt and processing of the application by the insurance commissioner and would not be properly subject to refund even though an applicant desires to withdraw such application after the filing thereof. An examination of the insurance code indicates that there is no provision for the refund of such appointment fee, except that in the event of error or overpayment, a refund would be justified.

Question 3 is therefore answered in the negative subject to the above qualifications.

## AS TO QUESTION 4:

Under the Florida insurance code provision is made for the issuance of a temporary license for general lines agents (§626.0112, F. S.; Florida insurance code, Ch. 10, §263), industrial fire agents (§626.0113, F. S.; Florida insurance code, Ch. 10, §264), life insurance agents (§626.0214, F. S.; Florida insurance code, Ch. 11, §294), and adjusters (§626.0421, F. S.; Florida insurance code, Ch. 13, §335). These temporary licenses are generally issued to applicants pending passage of an examination for a regular license, which examination must be taken within the period for which such license was issued. The license period will differ depending upon the particular class of insurance covered by such license. The rate of fee for such temporary license is based upon each month of the period for which the license has been issued, which rate, under §624.0300(14), F. S. (Florida insurance code, Ch. 4, §74(14)), is \$1 per month. If, for example, a temporary license were issued to a life insurance agent for the maximum 90-day temporary license period as provided under §626.0214, supra, the fee would be \$3.

In further regard to the temporary license for a life insurance agent, §626.0214(6), supra, provides that "no refund of such a" (temporary license) "fee shall be made after a temporary license is issued."

The temporary license is indeed a privilege extended to an applicant pending his examination; and it would appear to be extremely beneficial for an applicant to be permitted the use of such temporary license during the temporary period before he secures his regular license. Unless issued in error or a request for such temporary license is withdrawn prior to the issuance thereof, there can be no refund.

Question 4 is therefore answered in the negative subject to the above qualifications.

## AS TO QUESTION 5:

The various fees for the nonresident licenses as well as resident adjusters' licenses are contained in §624.0300, F. S. (Florida insurance code, Ch. 4, §74). This fee covers the *issuance* of such licenses. Examination of the various provisions of the insurance code indicates that there is no specific provision *per se* for the refund of the license fee for the various nonresident agents or adjusters, or resident adjusters. It would appear, however, that if a request for a nonresident or resident license is denied, a refund could properly be made under the authority of §626.291(5), F. S., which section authorizes the insurance commissioner to refund the state and county license tax to resident agents in the event the issuance of their licenses is denied.

It would further appear that if a request for withdrawal of an application for a nonresident license or resident adjuster license is made prior to the issuance of said license, a return could be properly made. Failure to qualify for such license would appear to entitle the applicant to receive a refund; and, if the applicant has in fact qualified and is currently licensed, he would appear to be entitled to a refund if he had paid duplicate fees on the basis of error or overpayment.

Question 5 is therefore answered in the negative subject to the above qualifications.

060-103—June 10, 1960

**STATE OFFICERS AND EMPLOYEES  
CALCULATING DAYS IN LEAVE OF ABSENCE FOR  
MILITARY TRAINING—§115.07, F. S.**

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

## QUESTIONS:

1. May a state employee who is entitled to military leave as contemplated by §115.07, F. S., be allowed such leave without loss of time, pay, etc., on the basis of the actual time lost from work or must he be charged on a calendar-day basis for the period covered by the military orders as appears to have been the intent of the language in response to question 3 in A. G. O. 051-273?

2. May the Florida industrial commission allow military leave for the actual time absent from work up to the maximum total period allowed by §115.07, F. S., and without regard to whether such military leave is taken intermittently or during a continuous period, provided that the total of such leave may not exceed the 17-day limit imposed by statute?

## AS TO QUESTION 1:

According to the facts presented in your inquiry one of the employees of the industrial commission is assigned for reserve purposes to an air force installation within 100 miles of Tallahassee which makes commuting possible. The particular employee is not only obligated to serve the ordinary 15-day tour of active duty each year but in addition he is, according to your letter, required to serve two additional days in alternating months or 12 days of active duty per year in addition to his 15 days active duty tour or

a total of 27 days annually. The file attached to your inquiry points out that this employee recently completed a 15-day tour of active duty and because of the intervening weekends which are nonwork days at the military installation, the employee in question was actually present for duty for but 10 days during the 15-day period described in the special orders authorizing the recent tour of active duty. It is because of these circumstances that inquiry is made as to whether the 17-day period described in §115.07, F. S., means consecutive calendar days or working days.

In construing statutes legislative intent is the pole star by which the courts are to be guided (*Florida State Racing Comm. v. McLaughlin*, Fla., 102 So. 2d 574, *Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d 647).

In construing this statute this office has been inclined toward the position that the 15 days called for in the special orders authorizing the tour of active duty contemplated *full time* duty for 15 consecutive days (see 10 USCA 9, §101 (22)). As pointed out in your inquiry this is the position this office took when A. G. O. 051-273 was published. As explained in that opinion "Time of service with the state is computed generally on a calendar month basis, not on a workday basis; thus, leave without loss of time would appear necessarily to mean time in state service, which includes Sundays and other holidays in any given period. If the 17-day leave is figured on a workday basis, there results a time of service with the state inconsistent with the recognized custom and rule as to computing such service."

In addition it is to be noted generally that the duration of the ordinary short tour of active duty is 15 days and thus it would appear that the legislature intended to grant time off without "loss of pay, time or efficiency rating" for the particular purpose of granting state employees the opportunity to complete a 15-day service obligation with a day for travel on each end of the tour. In the instant case it is not felt that the convenience of the military installation should operate to give one state employee an advantage over another employee who might be required to travel further to fulfill his obligation to the military.

While the attachments to your letter supplied by the employee in question and the legal authorities at the military installation to which he was assigned suggested this officer was not required to be on duty for five of the 15 days specified in his orders, this office took the precaution of attempting to confirm this matter with the judge advocate general of the air force in Washington in view of the provisions of 10 USCA §101 (22) referred to above which would suggest that the officer in question should have been available for full time duty on each of the 15 days of his tour. The following is a quote from Hdq., U. S. Air Force, Office of Judge Advocate General, in a letter dated 25 May 1960, which indicates that military personnel are on duty full time for the entire period specified in the orders calling them to active duty.

A member of the Air Force, once ordered to active duty, remains continuously on active duty until relieved by competent orders. The hours of work in no way affect his active duty status. Even though on active duty for training for periods of short duration, a member of the United States Air Force is subject to call for the performance of duty and receives pay and allowances, and is entitled to certain benefits, based upon his membership in

the service, during the 24 hours of each day, seven days a week.

In summary then, it would appear that the officer in question was required to be on duty and was subject to call for the entire 15 days specified in his orders and his pay allowances and benefits were determined upon that basis. The fact that his commander may have granted him permission to be away from his place of assignment after duty hours does not appear to alter the situation in the eyes of the federal government. Inasmuch as the state, like the federal government, pays its employees on a calendar month basis rather than a workday basis it would seem logical to conclude that the leave authorized by statute would also be figured on a calendar month basis.

For the reasons set out herein the position taken in response to question 3 of A. G. O. 051-273 is reaffirmed and question 1 is answered accordingly.

#### AS TO QUESTION 2:

On the basis of the authority cited and conclusion reached in answering question 1, question 2 is answered in the negative.

060-104—June 14, 1960

### SHERIFFS

FEEES AND COSTS OF EXECUTION AND LEVY—§30.51, F. S.

To: *Curtis R. Miller, Sheriff, Walton County, Defuniak Springs*

#### QUESTION:

**Who is responsible for the sheriff's fees and costs incurred when a levy is made under a writ of execution and no money is realized from the sale?**

Section 30.51, F. S., provides in part:

... All fees, commissions and other remuneration provided by law for services other than criminal shall be charged by the said sheriff to other authorities and parties doing business with their offices, *and shall be paid over to the county as provided in this section.* (Emphasis supplied.)

(2) *The fees authorized, or a deposit sufficient to cover them, shall be collected in advance from the party who requests the service; . . .*" (Emphasis supplied.)

A writ of execution is issued for the benefit of the plaintiff, and he has the right to control and direct what proceedings shall be taken thereunder (See *Lawyers' Coop. Pub. Co. v. Bennett*, 16 So. 185 (Fla.)). A sheriff or a county officer is under no duty to serve process or render statutory services unless he is paid in advance (See *Sweat, Sheriff, v. Waldon*, 167 So. 363 (Fla.); *State ex rel Cowles v. Butts*, Circuit Court Clerk, et al., 125 Fla. 584, 170 So. 714.)

When the amount of the bid under an execution levy is less than the amount of the judgment, it is the duty of the sheriff to collect his costs from the amount realized and turn over the remainder to the execution creditor (See 33 C. J. S. *Executions*, §244; *Zeigler v. Baker*, 142 So. 241 (Fla.)). This in effect places the burden of paying the costs on the judgment creditor until an amount is realized from the sale sufficient to pay both costs and the judgment sum.

Pursuant to the provisions of §30.51, supra, and the cited



cases, you are advised that when no proceeds are realized from a sale conducted under an execution and levy, the party requesting the execution and levy is responsible to the sheriff for the costs incurred thereby and that when an amount sufficient to pay the costs is realized from the sale, the costs should be paid out of that sum.

060-105—June 24, 1960

#### PUBLIC FUNDS

#### USE OF UNENCUMBERED BALANCES OF CATEGORICAL APPROPRIATIONS FOR HOSPITAL AID TO RECIPIENTS

— §§409.02 AND 409.33, F. S.

To: *Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

#### QUESTION:

Can the state budget commission authorize the state welfare board to use any unencumbered balances in the aid programs for which appropriations were made in §282.01(1), item 62, subsections b, c, d, and e, F. S., for the purpose of using such unencumbered balances to acquire matching federal funds to accomplish the purpose of providing hospital care for recipients of aid in the categories for which the foregoing specific appropriations were made?

Section 409.02, F. S., provides that the state department of public welfare shall, "pursuant to regulations promulgated by the state board, determine the amount of money and *other things of value* that each applicant or recipient of assistance or benefits under this law is entitled to receive subject to the limitations herein provided." (Emphasis added.)

The foregoing language does not appear to restrict aid to recipients to monetary grants. The italicized wording in the foregoing section would appear to permit the rendition of hospital care as an additional or other form of assistance permitted by said subsection. Moreover, §409.02(2), F. S., further provides that the state board of welfare may "prescribe such rules and regulations as may be necessary to meet the requirements of federal legislation, rules, regulations or enactments not inconsistent with the constitution or the laws of this state; and take such action as may be necessary to secure the benefits of any public aid for assistance of any character as may be available from the federal government or any agency thereof, which is not inconsistent with the constitution and laws of this state."

The foregoing language appears to give the welfare board authority to take such action as it deems necessary to gain the advantages of federal legislation relating to assistance to the indigent. Such assistance would appear to include hospitalization.

Section 409.33, F. S., authorizes the budget commission with the approval of the governor, to transfer surplus funds existing in any of the categorical programs to another or other categorical programs "whenever any appropriation heretofore or hereafter made to the department either for old age assistance, aid to dependent children, or aid to the blind, shall be insufficient to further provide such assistance to all persons lawfully entitled thereto. . . ."

In light of the above section, it appears that the legislature considered the possibility that a surplus might exist at some time and that such surplus should be available for use in the categorical program generally. The propriety of using such funds for the purpose of assistance in the way of hospitalization for persons receiving aid under the categorical programs is not difficult to conceive, especially in light of the language of this section which states: "This law shall be liberally construed to the end that old age assistance, aid to dependent children, and aid to the blind may be fully maintained, and if necessary, by transfer of funds under the circumstances and in the manner herein authorized."

In light of §409.33, F. S., relating to authority to divert surplus funds, and §409.02, which relates to the authority of the department of public welfare to provide "other things of value" to recipients under the categorical programs, and which further provides that the department may do all things necessary to gain the advantages of federal legislation relating to assistance to the indigent and the acquisition of matching federal funds, it is my opinion that the department of public welfare may prescribe such rules and regulations as may be necessary to meet the requirements of federal legislation to obtain such federal funds and that pursuant to such action the state budget commission would be authorized to transfer such unencumbered balances in such a manner as to permit the transfer of funds to be matched in accordance with federal legislation and thereafter use the combined funds for the purpose of providing hospital care for such categorical recipients.

In prescribing the rules and regulations necessary to meet the requirements of federal participation, the state department of public welfare ought to be mindful of the limitation contained hereinabove that the contemplated use of department funds for hospitalization assistance must be confined to those persons qualifying as recipients of aid under the categorical assistance programs from which the subject funds are being transferred.

In accordance with the foregoing authorities and reasoning, your question is answered affirmatively.

060-106—June 2, 1960

**STATE AND COUNTY OFFICERS AND EMPLOYEES  
RETIREMENT SYSTEM—SCHOOL TEACHERS—§§122.02,  
122.04, 122.18, 238.05(4), 238.06(3); CHS. 122 AND 238, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Are adult school teachers teaching less than 900  
clock hours a year entitled to membership in the state  
and county officers and employees retirement system?**

Under §122.04, F. S., the state and county officers and employees retirement system is compulsory as to *all state employees* entering state employment on or after July 1, 1947; and permissive as to persons entering such employment prior to said date who have or may comply with the statutory requirements. However, there is excluded from the said state and county officers and employees retirement system, by §122.18, F. S., members of other retirement systems, including the retirement system for school teachers, as provided by Ch. 238, F. S.

There is included in the state and county officers and employees retirement system, as provided by Ch. 122, F. S., "*all full time officers or employees who receive compensation for services rendered from state and county funds . . . provided, that such compensation, in whatever form paid shall be specified in terms of fixed monthly salaries* by the employing state or county agency or state or county official and shall not include amounts allowed for professional employees for special or particular service or for subsistence and travel expenses . . . ." (Emphasis supplied.) (§122.02(1), F. S.). Although generally within this definition, members of other state and county retirement systems are excluded, including members of the retirement system for school teachers. The term "salary" or salaries as used in said subsection (1) means "the fixed monthly compensation paid officers and employees . . . ." Of interest here is the proviso in said §122.02(5) which is as follows: "Provided that any nonacademic employee of a school board shall receive a full year's service credit for all years under the following conditions; (a) provided all necessary contributions have been made to the retirement fund; (b) provided the employee is employed and receives credit for the full school year."

From the above and foregoing, it appears that for officers and employees to be within the purview of the state and county officers and employees retirement system they must be *full-time employees on fixed monthly salaries*. "Full time" is defined by Webster as "the amount of time considered the normal or standard for working during a given period, as a day, week or month." In *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394, text 397, full time employment was deemed an employment or business to the exclusion of the conduct of other businesses such as require the substantial part of his time or attention. See also 17A Words and Phrases, 523-525. It appears from the file before us that the director of the teachers retirement system holds that a teacher to be within the system must work 900 clock hours or more per year; those without 900 clock hours are not within the system. It is presumed that this limitation is by rule under and pursuant to §238.06(3), F. S., authorizing the board of trustees to "fix and determine, by appropriate rules and regulations, how much service in any year is the equivalent of a year of service . . . ." It is provided in §238.05(4) F. S., that "the board of trustees may in its discretion deny the right to become members to any class of teachers who are serving on a temporary or other than a per annum basis . . . ." From these authorities and observations it seems that the board of trustees does not deem a teacher a full-time employee who teaches less than 900 clock hours per year. If such a teacher is not a full time employee under the teachers retirement system (Ch. 238, F. S.) may such teacher be deemed a full time employee under the state and county retirement system (Ch. 122, F. S.)? For nonacademic employees of the school board to become members of the state and county officers and employees system they must be employed and receive salary for the full school year.

The fact that persons teaching less than 900 clock hours per year does not appear to be within the purview of the teachers retirement system raises the presumption that they are not full time employees within the purview of §122.02(1), F. S., necessary

for membership in the state and county officers and employees retirement system.

In the light of the foregoing, the above stated question is answered in the negative.

060-107—June 2, 1960

**CORPORATIONS AND BUSINESS TRUSTS**  
**AUTHORITY OF CORPORATION TO ACT AS TRUSTEE OF**  
**A VOTING TRUST—§§608.43, AND 660.10(3), (8), F. S.**

To: *R. A. Gray, Secretary of State, Tallahassee*

**QUESTION:**

**May a Florida corporation act as trustee in a voting trust so that it may control a subsidiary corporation without actually owning a majority of the subsidiary's stock for the purpose of taking advantage of certain benefits under federal legislation?**

Section 608.43, F. S., authorizes persons holding stock in corporations to enter into written agreements vesting voting rights and granting authority to exercise the voting power of the stock described in the agreement. This statute does not make any distinction between artificial and natural persons and since corporations are considered to be persons, although artificial in nature, it is presumed that they may enter into the written agreements described in §608.43, F. S. The authority granted in the section just cited would appear to grant all the benefits which the corporation described in your inquiry is attempting to seek as it appears from your inquiry and its enclosures that there is no requirement under the applicable federal law for the trustee corporation to actually own any portion of the subsidiary corporation's stock.

As pointed out in your inquiry a corporation is not prohibited under the provisions of §660.10, F. S., (former §655.27) from acting as a trustee for the purpose of administering intangible personal property or money. (§660.10(3), F. S.) It is assumed that the trustee corporation under discussion does not desire to act as a fiscal agent, transfer agent or registrar for the subsidiary corporation as such acts would be prohibited under the provisions of §660.10(8), F. S.

In summary then, it would appear that a corporation may enter into written agreements with the stockholders of subsidiary corporations for the purpose of acting as trustee in a voting trust and may exercise the voting power of all the stockholders of said stock and may, as provided for by special agreement, exercise the right to increase or reduce the capital stock of the subsidiary corporation and exercise other powers with respect to stock as may be lawfully exercised by way of such an agreement so long as said corporation is by its charter authorized to enter into such agreements.

Conditioned upon the remarks set out herein, your question is answered in the affirmative.



060-108—June 24, 1960

## TAXATION

## AD VALOREM TAXES AGAINST MAUSOLEUMS—CONSTRUCTION OF TERM "SPECULATIVE PURPOSE"—§192.06(4), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

## QUESTION:

Are mausoleums designed and maintained for the interment of the dead and open to the public generally, or a large segment thereof, subject to ad valorem taxation?

Mausoleums are usually designed and maintained as above ground structures where human remains are disposed of by being placed in crypts or niches; the crypts being designed to receive human bodies in caskets or the like, while the niches are designed to receive the ashes of cremated human bodies. Such mausoleums are of varying sizes, often being designed to receive hundreds, and in some cases even thousands, of human bodies or the ashes of cremated human bodies. A mausoleum, like a cemetery, is a place of interment of the human dead, so that it is not so disconnected from the functions of a cemetery as to be said to be a non-cemetery use or function (*Anshe Sephard Congregation v. Weisblatt*, 170 Md. 390, 185 A. 107, text 108; *Dearing v. Walter*, 175 Va. 555, 9 S. E. 2d 336, text 339; *Oakwood Co. v. Tacoma Mausoleum Ass'n*, 22 Wash. 2d 692, 157 P. 2d 595, text 596; *Moore v. Fairview Mausoleum Co.*, 29 N. J. Super. 309, 120 A. 875; *Washelli Cemetery Ass'n v. King County*, 158 Wash. 599, 292 P. 101, text 102). To all intents and purposes the mausoleums here considered and contemplated are in legal effect cemeteries or burial grounds designed for burial above, instead of below, ground.

Section 192.06(4), F. S., after providing tax exemption for houses of public worship and parsonages, provides tax exemption for "all burying grounds *not owned or held by individuals or corporations for speculative purposes*, tombs and right of burial." (Emphasis supplied.) The italicized language first appeared in the statutes and laws of this state as a part of §4, Ch. 4010, 1891; prior to said Ch. 4010, the exemption was of "all burying grounds, tombs and rights of burial." (Item 4th, §4, Ch. 3681, 1887; see also item 4th, §4, Ch. 1713, 1869). Tax exemption for cemeteries and burial grounds is favored on grounds of public policy; one reason given for such exemption being the difficulty of collecting a tax thereon, due to the impropriety of selling graves of the dead through tax foreclosures and other process (51 Am. Jur. 612, §645). Some authorities hold that the exemption from taxation of cemeteries extends to property actually used as a cemetery, or intended to be so used, provided some measures have been taken to prepare it for use (84 C. J. S. 599, §292). Upon the question of taxation and tax exemption of cemeteries and similar, see 84 C. J. S. 597-602, §292; 51 Am. Jur. 612-614, §§645 and 646; 2 Cooley on Taxation, 4th Ed. 1535-1538, §736; and Annotation in 168 A. L. R. 283-311. See also our opinion of June 14, 1954, (054-143; 1953-1954 A. G. O. 214).

Doubtless the phrase "speculative purposes," as above quoted from §192.06(4), F. S., is used in the commercial sense. The court in *Mutual Life Insurance Co. v. Lane*, CC Ga., 151 Fed. 276, text 284, defined the word "speculative" as meaning disposed toward

speculation as distinguished from investment. A speculative transaction has been defined as one outside of the range of ordinary buying and selling, and involves elements of risk and uncertainty (*Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N. E. 357, text 360). Speculation has been said to include the practice of buying lands, goods, shares, etc., in expectation of selling at a higher price (*U. S. v. Kettenbach*, CCA Idaho, 208 Fed. 209, text 213), or as taking the risk of loss in view of possible gain (*Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, text 796). See also definitions of "speculate," "speculation," and "speculative" in Webster's dictionary.

Mausoleums being burial grounds or tombs within the purview of §192.06(4), F. S., the exemption therein provided is applicable to mausoleums so that they are entitled to the exemption therein provided *unless owned and held for speculative purposes*. Crypts and niches in such mausoleums belonging to purchasers or lessees and held for burial use and not for speculation are clearly within the exemption. Mausoleums having crypts or niches in stacks or one above the other, when sold or leased to separate owners or lessees, present problems of classification, as to whether each crypt or niche, above the first one above the ground, is real property or some other type of property, for the purposes of taxation.

These authorities, statutes and observations lead to the conclusion that mausoleums, including the crypts and niches therein, are not subject to taxation unless owned and held by individuals or corporations *for speculative purposes*, as above defined.

060-109—June 27, 1960

## LABOR

### APPLICATION OF INDUSTRIAL COMMISSION'S SAFETY RULES—CH. 440 AND §§440.02, 440.05 AND 440.56, F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

#### QUESTION:

May the Florida industrial commission compel compliance with the provisions of safety codes adopted by it pursuant to §440.56, F. S., by those employers who are excluded from the provisions of Ch. 440, *supra*, either because such employer has rejected the act pursuant to §440.05, F. S.; is an employer of less than three employees and thereby excluded by §440.02, F. S.; or for other reasons?

Your question is answered by the case of *Baker v. Great Atlantic and Pacific Tea Co.*, 212 F. 2d 130, wherein the U. S. Court of Appeals, 5th Circuit, held that where an employer who had elected not to accept the provisions of the Florida workmen's compensation law was not subject to the provisions of §440.56, F. S. The rationale found in this case would apply regardless of what reasons Ch. 440, *supra*, did not apply to the employer.

Your question is accordingly answered in the negative.

060-110—June 28, 1960

### INSURANCE

#### CONSTRUCTION OF §625.0104(2) (a), (b), F. S., PROVIDING FOR DIVERSIFICATION OF INVESTMENTS BY DOMESTIC INSURER

To: *Egbert Beall, City Attorney, West Palm Beach*

#### QUESTIONS:

Construing §625.0104(2) (a), (b), F. S., which provides: (a) No life insurer may invest more than 10% of its admitted assets in stocks authorized under §625.0123 (corporate stocks); (b) No life insurer may invest more than 3% of its admitted assets in the stock or shares, authorized under §625.0123 (corporate stocks), of any one corporation;

1. Can there be invested 10% with one mutual company and it diversify the investments to comply with the 3% limitation in any one company, or

2. Is the limitation on investments not over 3% with each mutual company up to 10%, or

3. Is it permissible to invest full 10% with a mutual company; but if the choice to invest in common stocks is made, is there a limitation to investments in any one general company not to exceed 3%?

For purposes of this opinion, *mutual company* will refer to *mutual fund investment company*.

#### AS TO QUESTION 1:

The answer suggested by question 1 is erroneous because more than 3% would be invested in the corporate stock of the mutual company, which investment would be in conflict with the prohibition of §625.0104(2) (b), F. S., and for the reason that it shifts responsibility from the insurance company to the mutual company to abide by the restriction of subsection (2) (b), *supra*.

#### AS TO QUESTION 2:

Question 2 suggests the most acceptable interpretation of the above-quoted section. The most that can be invested in corporate stocks is 10% of admitted assets. This 10% investment is further limited by the provision in subsection (2) (b), *supra*, that not more than 3% of this 10% may be invested in any one corporation.

#### AS TO QUESTION 3:

The answer suggested by question 3 is erroneous. The 3% limitation of subsection (2) (b), *supra*, applies to any corporate stock in which it is legal for the insurance company to invest. The investment contemplated by question 3 is the investment in the stock of the mutual company and not that in the stock of the other companies, which stock is owned by the mutual company. Therefore, not over 3% of the assets of a life insurer may be invested in a mutual company or in any one general company.

060-111—June 30, 1960

### PUBLIC LANDS

#### CONSTRUCTION OF §253.0013(2), F. S.

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

#### QUESTIONS:

1. Is the holder of an unexpired U. S. permit who is

qualified to fill under §253.0013(2), F. S., but has not filled, entitled to purchase without advertisement for objections at the appraised value of the permit area in the unfilled state?

2. Is the holder of U. S. permit which was in effect June 11, 1957, but since expired or was extended in time by the U. S. engineers, and who has not yet filled, entitled to purchase without advertisement?

3. What effect does relocation, under §253.122, F. S., of a bulkhead line legally fixed prior to June 11, 1957, have upon the rights of the holder of a U. S. permit qualified to fill under said statute?

4. Where the holder of a valid permit issued by the corps of engineers transfers the upland riparian to the area covered by said permit or is divested of the title to said upland by judicial process, is the transferee of the upland entitled to the benefit of the fill permit theretofore issued?

5. Where there is an extension or modification of a U. S. permit, which permit qualified under the exemptions found in said statute, is the holder of the extended or modified permit exempted from the provisions of the bulkhead law by virtue of said §253.0013(2), F. S.?

Section 253.0013(2), F. S., provides:

The provisions of this act shall not affect or apply to the construction of islands or the extension or addition to existing lands or islands bordering on or being in the navigable waters as defined in §253.12 herein of the state which was commenced or application for permit to fill which was filed with the United States corps of engineers prior to the effective date of this act as to lands or bottoms lying between ordinary high water mark and a bulkhead line heretofore established by any county, city or other political subdivision of the state by official action of its governing body.

It will therefore be seen from the provisions of the section that the following situations are contemplated:

(1) Additions or extensions to uplands commenced prior to June 11, 1957, within an established bulkhead line established prior to June 11, 1957; (2). Pending applications for permits filed with the U. S. corps of engineers prior to June 11, 1957, as to lands lying within an official bulkhead line theretofore established by competent authority. While not specifically provided for, the statute has been informally construed to include fill permits issued prior to June 11, 1957 and valid and existing on that date, where there was an established bulkhead line as provided by the act.

The exceptions found in §253.0013, F. S., have the effect of exempting the person who qualifies from the requirement of the establishment of a bulkhead line for the purpose of filling and from the obtaining of the permit required by §253.124, F. S. It also gives him a right to fill the land included in the permit without first acquiring the title.

As has been indicated above, the provisions of §11, Ch. 57-362, now §253.0013(2), F. S. are in the nature of exceptions from the requirements of the act and must be construed in that light. "Ex-



ceptions in a statute, as a general rule, should be strictly construed, and, at the same time, exceptions should be reasonably construed; . . ." (82 C. J. S., p. 891). The rule is stated in 50 Am. Jur., Statutes, p. 451 that "Ordinarily, a strict or narrow construction is to be applied to statutory exceptions to the operation of laws. This rule is particularly applicable, where the statute is promotive of the public welfare, . . ."

However, it is pointed out in 82 C. J. S. 893 that an exception must be construed so as to conform with the purpose and meaning of the statute. There is a technical distinction between provisos and exceptions in statutes, but many decisions have disregarded this distinction. The supreme court of Florida, in *Farrey v. Bettendorf*, 96 So. 2d 889, 893, said: "A proviso is to be construed strictly and limited to provisions fairly within its terms, or to qualify or restrain its generality."

From the foregoing statement we must approach the interpretation of the provisions of the statute in question so as to construe it strictly, particularly since it is apparent that the purpose of Ch. 57-362 is to protect the public interest concerning the subject matter of the legislation. Your questions are, therefore, answered as follows:

1. The holder of an unexpired U. S. permit qualified to fill under §253.0013(2), F. S., but who has not filled, is permitted to fill the submerged land as limited by the permit which he holds. If he desires to purchase rather than to exercise his right to fill, the provisions of the bulkhead law are applicable and there must be compliance with the requirements for notice and advertising.

2. Where a permit has expired or is extended by the corps of engineers subsequent to June 11, 1957, we feel that the provisions of the statute have not been met and that the exceptions from the provisions of the so-called bulkhead law are not applicable. The applicant must then purchase as required by the law.

3. Where a bulkhead has been fixed subsequent to June 11, 1957 under Ch. 57-362, and a bulkhead had been previously fixed by competent authority and the person holds a valid permit as contemplated by §253.0013(2), F. S., the setting of the new bulkhead line does not affect the holder's right to fill according to his permit issued prior to June 11, 1957, nor the area fixed by the original bulkhead line.

4. The legislature must have intended to give the holder of the permit or the applicant for permit whatever rights existed under said permit on June 11, 1957. In this connection you have furnished us a letter from Mr. A. L. McKnight, chief operations division, U. S. army engineer district, Jacksonville, dated June 8, 1960, in which he quoted the following regulation:

Permits express merely the assent of the Federal Government so far as concerns the public rights of navigation. Although issued to a specific party, the assent is not limited to execution of the work by that party and may be availed of by the assignees or purchasers of the property affected, provided the terms of the instrument are strictly complied with.

The permit then is not personal to the holder, but is granted solely upon the question of navigation. The regulation clearly gives the successor in title to the property the right to proceed under the permit. The legislature must be presumed to have had knowledge of the assignability of the U. S. permit at the time

of the passage of the bulkhead law. We feel that the question must be answered in the affirmative.

5. Since the exemption is to be strictly construed, any change in the permit as originally issued, whether by way of extension of time or area covered, is not in compliance with the exception of the statute. The holder of the permit as modified or extended has no right to be excepted under §253.0013(2), F. S.

060-112—June 30, 1960

**COUNTY OFFICERS AND PUBLIC RECORDS  
USE OF MAPS, PLATS, DRAWINGS AND OTHER DOCUMENTS  
IN TAX ASSESSING OFFICES; PRIVATE RIGHTS IN  
§§119.01, 119.03 AND 193.17, F. S.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**May maps, plats, drawings, and other tax assessing aids and equipment used by the county assessor of taxes be reproduced and used or sold by members of the public when the same is copyrighted, or there are private property rights in the same?**

Although this office by its opinion of Aug. 29, 1957, (057-264; 1957-1958 A. G. O. 316) held land study maps, also known as assessors' maps or section maps, property record cards, correspondence files, and other documents in the office of county tax assessors of this state to be public records within the purview of §119.01, F. S., generally, it was noted in said opinion that it did "not consider or discuss the right of the tax assessor or the clerk to furnish, under §119.03, F. S., negatives of public records from which copies may be made."

Section 193.17, F. S., makes provision for the purchase of photolithographed township maps to be kept and maintained in the office of the county assessor of taxes, and further authorizes the use of "maps and information which may come into the hands of the several county assessor of taxes' office" and requires that the same be passed on to the successor assessors of taxes. We find nothing in said §119.03 or §193.17, F. S., indicating a legislative intention to interfere with or violate private rights in and to said maps and information.

Doubtless copies of copyrighted maps and plats are obtained for use in county assessing offices, and which are used in the assessing of property and property rights reflected by said maps and plats; the obtaining of such maps and plats for use in tax assessing offices must be, and is subject, to copyright statutes and laws, and we do not think that the use of such maps and plats by the tax assessing office gives members of the public any right to violate private personal rights acquired under the copyright.

The word "property" embraces everything which is, or may be, the subject of ownership, whether legal, beneficial or private ownership, or to which the right of property may legally attach, no matter how infinitesimal in quantity, and the term is understood to include every class of acquisitions which a man may own or have an interest in, including everything of value which may be lawfully acquired and owned or which is capable of being the subject of individual right or ownership (73 C. J. S. 140-141, §1). Dramatic and musical compositions, architectural plans and

drawings, lectures, sermons, addresses, and many other things of like or similar nature, although not copyrighted, have been held to be property and protected by the common law as species of property (18 C. J. S. 141, et seq., §10). Maps and plats of real property are classified as intellectual productions or compositions differing little, if any, from other forms of property in the protection which the common law throws about it (18 C. J. S. 139, §§ 4 and 5). The basis of this property right is doubtless the mental effort necessary to its production and the right of everyone to the fruits of his own labor. Therefore, a map or plat produced by an individual, for his own use or distribution, appears to be property subject to ownership.

Although maps and plats may be obtained by the board of county commissioners of a county for use of its tax assessing office, or by the tax assessor for the account of his office, such plats and maps may, depending on the particular circumstances in each particular case, be subject to property rights of their author, or under the copyright, if copyrighted, which may not be violated by persons, firms or corporations taking and publishing, selling or using such maps and plats, and if so violated, such persons, firms or corporations may be liable in damages. Maps and plats, purchased for use of the tax assessing office, especially where copies are purchased and used, for use by the tax assessing offices do not become public property for general reproduction, sale and use so long as the copyright or common law right remains.

Maps, plats, drawings and other tax assessing aids and equipment used by the county assessor of taxes may be reproduced, and used or sold, by members of the public when the same is copyrighted or where there are private property rights in the same, only when such reproduction, sale or use will not violate such copyrights or private property rights of the author of such maps, plats, etc. No general answer may be given to this question applicable to particular cases. Persons reproducing and selling or using such plats, maps, etc., do so at their own peril.

The right of an employee of a county assessor of taxes in this state to copyright maps or plats drawn by him during such employment and used by such office depends upon the ownership of such maps and plats. Whether owned by the tax assessor's office or the employee producing them depends upon the circumstances and agreement under which such plats or maps were produced. In the last paragraph of the tax assessor's letter, furnished us as a part of your file handed us with the request for opinion, there may be indication that the office may in some instances use blueprints or reproductions of maps or plats produced by an office employee. *Although the fact that such maps or plats may have been produced by an office employee while working in the tax assessing office and on county time raises a presumption of such maps or plats being county property, the ownership is in fact a matter of intention and agreement between the assessor of taxes and the said employee.*

Where the plat or map is the property of the county, or other public agency, subdivision, district, or board, it is doubted that under the laws of this state the same would be subject to copyright, and would be a public record subject to public inspection, etc.

This opinion is not deemed in conflict with the one of Aug.

29, 1957, above mentioned, but merely as a further discussion of the exception mentioned in the last paragraph of said opinion of Aug. 29, 1957.

060-113—July 6, 1960

### CIVIL PROCEDURE

DEPOSITIONS UPON ORAL ARGUMENT—RULES 1.24(e), 1.24(f) AND 1.26(d), FLORIDA RULES OF CIVIL PROCEDURE

To: *Mrs. Rosie Sclafani, Official Court Reporter, 10th Judicial Circuit, Lakeland*

#### QUESTIONS:

1. May the reporter mail the original deposition to defendant's attorney without certification when plaintiff's (deposed witness) attorney has failed to read the deposition due to his own neglect and the deposition is unsigned and signature unwaived for a period of several months?

2. If the attorneys for the respective parties stipulate to waive filing and notice of filing of deposition, is it permissible for the reporter taking such deposition to mail the original and one copy to the attorney ordering same without first filing the original with the clerk?

#### AS TO QUESTION 1:

Rule 1.24(e), Florida rules of civil procedure, holds that: ... If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 1.26(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Rule 1.24 (f) (1), Florida rules of civil procedure, provides:

(1) The officer (the reporter in this case) shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. ...

The procedure that I would recommend your following is to write the plaintiff's attorney inquiring of him if he has any reasons that he would like you to place on the deposition as to the witness's failure to sign the deposition and further explaining that you are going to have to treat any further delay in either the signing of the deposition by the witness or a waiver of the witness's signature as a refusal to sign and then proceed according to rule 1.24 (e), Florida rules of civil procedure, and sign the deposition as though the witness had refused to sign same.

It would then be proper for you to certify the deposition as required by rule 1.24 (f) (1), supra. The deposition should then be filed; or, if filing has been waived, the original should be sent to the defendant's attorney. Question 1 is answered accordingly.

#### AS TO QUESTION 2:

Rule 1.24 (f), Florida rules of civil procedure, F. S. A., provides



that the officer shall file the original deposition, securely sealed, with the court. However, as is pointed out by the author's comment under this rule, while the filing of the deposition with the clerk is essential to its availability for use at the trial, there seems to be no good reason why the filing of the deposition taken solely for discovery purposes cannot be waived.

Stipulations between parties and their attorneys will ordinarily be enforced by courts if not contrary to good morals or sound public policy (*Smith v. Smith*, 107 So. 257).

Question 2 is answered to the effect that even though rule 1.24 (f), *supra*, requires filing of the deposition, such requirement can be waived by stipulation of the parties; and the officer (reporter) taking such deposition may then mail the original and one copy to the attorney ordering same without filing the deposition with the court.

060-114—July 13, 1960

**STATE OFFICERS AND EMPLOYEES  
TRAVEL AND PER DIEM EXPENSES—CENTRAL AND  
SOUTHERN FLORIDA FLOOD CONTROL DISTRICT—  
§§378.15(3), 112.061(1); CH. 378, F. S., AND CH. 25214, 1949**

To: *G. E. Dail, Jr., Executive Director, Central and Southern  
Florida Flood Control District, West Palm Beach*

**QUESTION:**

May the governing board of the central and southern Florida flood control district authorize its executive director or other members of its staff to be reimbursed for travel expenses in connection with the district's business on an "actual expense" basis, rather than a fixed per diem rate for subsistence and lodging?

Section 378.15 (3), F. S., designates the per diem and travel expenses allowed to the chairman and members of the board of the district. However, neither Ch. 378, F. S. (under which the district operates and is governed), nor Ch. 25214, 1949 (which created the central and southern Florida flood control district) contains provisions for the payment of per diem and travel expenses to the executive director and other members of the staff.

Section 112.061 (1), F. S., provides that:

State officers and employees . . . when traveling within the state on state business shall be allowed for subsistence \$11.00 per diem; . . . The amount to be allowed for mileage when any state officer or employee is using a privately owned car shall be ten cents per mile; state officers and employees traveling by any common carrier on state business shall procure from the state comptroller and use a transportation request.

Other subsections provide the rates to be allowed for out-of-state travel.

If the executive director or members of the staff of the district are state officers or employees within the purview of §112.061 (1), *supra*, then such persons are bound by its provisions relating to expenses. See A. G. O. 058-2, issued Jan. 2, 1958; 056-131, issued May 9, 1956.

The district was created by an act of the state legislature

(Ch. 25214, 1949). The district is comprised of numerous counties covering a large portion of the state (§2, Ch. 25214, *supra*). The members of the board of the district are appointed by the governor and confirmed by the state senate (§378.13 (3), F. S.). The district derives its taxing power from state legislative enactments (§3, Ch. 25214, 1949; §§378.20 and 378.29, F. S.). The district's accounts are subject to audit by the state auditor (§378.43, F. S.). The legislative appropriation for Florida flood control districts for the biennium period 1959-1961 was \$3,250,000 (Ch. 282, F. S.).

The supreme court of Florida in *Forbes Pioneer Boat Line v. Bd. of Commissioners of Everglades Drainage District*, 82 So. 346, held that the board of commissioners of the Everglades drainage district was a public quasi corporation and as such, a *governmental agency* of the state. The character and nature of that district was substantially the same as this flood control district.

Therefore, it seems that the executive director and employees of the district are state employees within the purview of §112.06 (1), *supra*, and as such are governed by the provisions of that statute pertaining to subsistence and travel expenses.

Accordingly your question is answered in the negative.

060-115—July 13, 1960

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS  
SUPERVISION OF REGISTRATION—COMPENSATION FIXED  
BY LOCAL LAW—§98.161, F. S.**

To: Bryan Willis, State Auditor, Tallahassee

**QUESTION:**

When the compensation of a supervisor of registration is fixed by local law at a certain salary, with no provision as to which services are or are not compensated by such salary, may the supervisor be paid additional amounts by the board of county commissioners or board of public instruction for his personal services in performing any of the duties required of him by law in connection with registering voters and conducting an election?

The above question refers neither to reimbursement of expenses nor to additional compensation for the performance of duties authorized but not required by law; said question relates solely to the compensation for personal services for the performance of duties required by law to be performed by the supervisor.

The general law fixing the compensation of the supervisors of registration is set forth in §98.161, F. S. A portion thereof provided that the compensation of the supervisor "shall be of such sum in proportion to the amount of work to be done and allowed by his board of county commissioners; provided that the compensation is not less than one hundred dollars per annum."

It is recognized that in a number of the counties of this state, the compensation of the supervisor is fixed by special or population act. Where such has been accomplished under valid legislation the provisions of such act will supersede the provisions of the above mentioned general law.

In opinions 050-532 and 050-547, pp. 101 and 102 of the 1949-50 biennial report of the attorney general, this office passed upon two

questions similar to the instant inquiry. In opinion 050-532 I held that the supervisor of registration of Clay county was not entitled to compensation for his services performed in transcribing the names of registrants into new registration books, in addition to his stated annual salary provided by the special act involved therein. In opinion 050-547 I held that the supervisor of registration of Nassau county was not entitled to compensation for his services rendered in preparing a list of the freeholders for the benefit of the county commissioners in addition to his stated annual salary as set by the special act involved therein. I stated in said opinion:

It appears that this act supersedes the provisions of section 98.17, with respect to the compensation of the supervisor of registration in Nassau County. Since no provision is made in Chapter 25128 for additional compensation to be paid to the supervisor of registration in Nassau county for doing work for the benefit of the county, your question must be answered in the negative.

It should be noted that the provisions relating to the compensation of the supervisor presently appearing in §98.161, *supra*, were formerly contained in §98.17, F. S., referred to in opinion 050-547, *supra*.

The salary of the supervisor of registration when fixed by a special act contemplates that such compensation will cover any duties required by law to be performed by said supervisor. In absence of special amendatory legislation, the board of county commissioners has no authority to pay the supervisor of registration additional compensation for duties required of him by law in connection with voting and conducting elections.

In light of the above statements it is my opinion that your question should be answered in the negative.

060-116—July 14, 1960

### CRIMES

#### LOTTERY—GROCERY CHAIN PROFIT-SHARING BONUS SCHEME AS CONSTITUTING

To: *P. C. Gorman, City Attorney, Leesburg*

#### STATEMENT OF FACTS:

A certain grocery chain is conducting a "profit-sharing bonus" scheme wherein participants are awarded from \$1 to \$1,000. The promoters furnish by mail to prospective customers a set of rules and answers to 20 questions relative to U. S. history and a bonus card. The bonus card is designed somewhat like a common meal ticket and contains numerals ranging from \$.10 to \$2. Upon the purchase of groceries from a participating store, a number of numerals on the bonus card equivalent to the cost of the groceries are punched from the card. If no purchase is made the card holder is entitled to have one numeral punched from his card. When all numerals have been punched from the card it is presented to the cashier and a small seal is broken from the card. Underneath the seal appears an amount of money and a question relating to American history. If the customer answers the question

correctly, he is awarded a cash bonus in the amount registered beneath the seal.

#### QUESTION:

**Does the scheme described in above statement of facts constitute a violation of the lottery laws of Florida?**

There are three material elements necessary to constitute a lottery, viz: (1) a prize, (2) an award by chance, and (3) a consideration. The elements of consideration and prize are so readily apparent in the above described scheme that they merit no further comment. I assume that the participant cannot consult the printed answers at the time a question is put to him and whether he wins is ordinarily dependent upon how well he remembers. Therefore, I don't think that it can logically be said that the award is made by chance merely because the answers to the 20 questions are made available to all participants.

However, I think that there is another reason why chance predominates. The scheme is open to the general public and therefore it must be judged upon the basis of whether the members of the general public are capable of memorizing and retaining in mind the answers furnished. If they can, the award is made for having a good memory; if they can't, the award is made upon the basis of guesswork. I don't think that they can.

It is to be recognized that all sorts of people will be involved, the young and the old, people with good minds and memories, those who are mentally dull and incapable of memorizing and remembering the 20 answers furnished them.

Some of the answers are such that almost any intelligent person could memorize and remember them. But others are difficult to remember, such as No. 8 (that Eisenhower is the 34th president). Nos. 1, 4, 9, 14, 16 and 17 deal with who were the 2nd, 16th, 30th, 26th, 3rd and 18th presidents.

I think that, with many exceptions, of course, the general public is incapable of memorizing the 20 answers and retaining them in mind long enough to give correct answers at the store. If this be a fact, I believe that it infects the whole scheme with the element of chance which is essential to a lottery.

I therefore conclude that the element of chance does predominate over the element of skill in the scheme as outlined, and the operation of same would constitute a violation of the lottery laws of Florida.

060-117—July 15, 1960

#### CRIMES

##### LOTTERIES—ELEMENTS CONSTITUTING

To: H. H. Baskin, Jr., City Attorney, Clearwater

#### QUESTION:

**Do the contests described below constitute lotteries?**

##### AS TO CONTEST 1:

The first contest you describe is open to all persons in the city of Clearwater. Participation in this contest is secured by a person simply mailing his address to the municipal gas department and thereby becoming eligible to win a \$1000 cash prize to be awarded by a drawing.



There are three elements in a lottery, viz: a prize, an award by chance and a consideration.

It is apparent that this advertising scheme carries with it a prize awarded by chance and, therefore, the first two elements of a lottery are present.

While the participants of this particular contest do not incur the detriment, travel expense and inconvenience which is usually relied upon to find the element of consideration in such schemes inasmuch as the participants in this particular contest do not have to go to the place of business to secure an entry blank, I still think that the element of consideration is present. The opinion to which you referred, viz: AGO 060-76, discusses the proposition of consideration being present through the use of the entries to obtain a ready mailing list of potential customers. That this possibility would provide the consideration necessary to denominate a particular scheme a lottery, see the cases of *Knox Industries Corp. v. State, Okla.*, 258 P. 2d 910 and *State v. Lynch, Okla.*, 137 P. 2d 949. The fact that the city of Clearwater may not intend to sell appliances permanently as an adjunct of performance of its proprietary function in operating a natural gas facility does not detract from the fact that the city is selling such appliances at this time and obviously does hope to receive a great benefit from this contest by advertising such facility, and, hopefully, increasing its use by the public.

Therefore, I am of the opinion that contest 1 constitutes a lottery under the laws of this state.

#### AS TO CONTEST 2:

Contest 2 which you describe contains three elements.

The first is that only persons who purchase, during the year 1960, the heating systems manufactured by the firm conducting the contest, are eligible to enter. The second is that such person must match the features of this particular heating system with the benefit that such feature produces. The third is that such person must finish in 25 words or less a statement designed to elicit endorsement of the product. According to the contest blank, the winners will be determined by those making the highest score on matching features and benefits with the jingle contest being used to determine winners in case of ties.

The elements of prize and consideration in this contest are believed to be apparent.

In view of the many variables always present in contests such as this, I am unable to give an unequivocal answer to your question. However, depending upon the method followed in conducting this contest, it might involve such an exercise of skill that it would not constitute a lottery.

Your attention is invited to the discussion of the element of skill contained in my earlier opinion, 058-128, dated April 14, 1958. It is suggested that you review the manner in which this contest is to be conducted to determine whether the contest will be run in such a fashion that the correct answers to the matching of benefits and features will be made available to the general public in other advertising material of the manufacturer or by some other means so that this effort to make this a contest of skill would constitute a mere sham or subterfuge. Furthermore, I would suggest that you review the matching section of this contest to determine whether the correct answers are either so easily determinable as to be suf-

ficiently frivolous to remove this contest from the exercise of skill or so difficult as to require expert knowledge to compete so that the element of chance would predominate due to the fact that the average person would be restricted to competing on guesswork.

In view of the above, I am of the opinion that this contest would not constitute a lottery if you should find the element of skill to be present in any of the ways indicated above. However, if for any of the reasons indicated above, the effort to add an element of skill to this contest should fail, then it would constitute a lottery.

#### AS TO CONTEST 3:

Contest 3 which you describe is open to salesmen selling the products of the sponsor's organization. Apparently, each sale made by a salesman entitles him to a chance which will be placed with other chances with the winner to be determined by a drawing.

Again, it is clear that this contest involves a prize and an award by chance.

If we assume that the salesman sells appliances manufactured by other firms in addition to the appliances manufactured by the sponsoring firm, then I believe that the element of consideration would be present in that the salesman would be induced to attempt to sell the appliances of the sponsoring firm in preference to those of the other firms. Furthermore, the sponsoring firm would receive an additional benefit by virtue of increased sale promotion given to its product by salesmen handling appliances made by a number of firms.

If the salesman sells only appliances made by the sponsoring firm, the element of consideration would be present by virtue of the fact that the salesman would expend extra effort in selling the product.

Under either type of sales arrangement described above, the sponsoring firm would benefit from the sale of its products. If the product is on consignment, then upon sale, the sponsoring firm would be paid therefor. If the city has purchased the goods outright, then the sponsoring firm would be benefited since, in the normal course of business, the city could be expected to replace the item sold from its stock. Therefore, whether the goods were on consignment or purchased outright for resale, the sponsoring firm would benefit by being paid for one of its products.

In view of the above, I am of the opinion that contest 3 which you describe would constitute a lottery.

I trust that the enclosed information will be of some assistance to you.

060-118—July 21, 1960

#### INDUSTRIAL COMMISSION—SUBPOENA POWER VOCATIONAL REHABILITATION PROGRAM—CONSTRUCTION OF STATUTE PROHIBITING MISUSE OF RECORDS— §§229.37 AND 440.33(1), F.S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

#### QUESTION:

May counselors who are employed in connection with the vocational rehabilitation program be required to respond to a subpoena issued by the deputy commis-

sioner to appear and testify in connection with workmen's compensation cases pending before such deputy? By virtue of §1, Art. V, State Const., which provides:

The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish, proceedings before the Florida industrial commission are proceedings before a quasi judicial body.

In workmen's compensation cases the deputy commissioner has, by statute, the power to "issue subpoenas for . . . and compel the attendance and testimony of witnesses or the production of books, papers, documents and other evidence . . ." (§440.33(1), F. S.).

The vocational rehabilitation program, §229.25 et seq., F. S., is a joint federal-state undertaking to provide vocational rehabilitation services to qualified disabled individuals. Federal regulations governing this program set out that state agencies are to adopt such regulations as are necessary to assure that, all information as to possible facts given or made available to the state agency, shall be held to be confidential.

Federal regulations contemplate that the use of such information be limited to purposes directly connected with the program, except that any information can be disclosed where consent of the client is given, either expressly or by necessary implication, and such information may be released to welfare agencies or programs from which the client has requested certain services under circumstances from which his consent may be presumed.

Section 229.37, F. S., enacted to comply with the aforementioned federal regulations prohibiting misuse of vocational rehabilitation lists and records, states as follows:

It shall be unlawful, except for purposes directly connected with the administration of the vocational rehabilitation program, and in accordance with regulations, for any person or persons to solicit, disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any list of, or names of, or any information concerning persons applying for or receiving vocational rehabilitation, directly or indirectly derived from the records, papers, files, or communications of the state or subdivisions or agencies thereof, or acquired in the course of the performance of official duties. Any violation of this provision is hereby declared to be a misdemeanor and shall be punishable accordingly (Laws 1949, c. 25364, §13).

The provisions of this statute pose the question as to whether or not employees and records of the vocational rehabilitation program may be subjected to service of a subpoena. Does the statute merely prohibit the misuse of confidential information or does it make information and data privileged matter?

In construing a particular statute, in order to determine whether it forbids disclosure of information by public officials, the courts will frequently compare its wording with the phraseology of other statutes passed by the legislature, dealing with non-dis-

closure, to show the legislature's familiarity with the various types of phraseology which can be employed in such instances, and to endeavor to ascertain what had been the legislative intent in enacting the particular statute before the court for construction. See 165 A.L.R. 1310; also see §448.06(4), F.S., for comparison of §229.37, F.S., supra, with type of statute deeming state agency, information, documents, records and employees thereof, to be privileged and subject to complete immunity thereby.

No Florida cases interpreting, §229.37, F.S., supra, are to be found. However, an Illinois court interpreting a statute which is verbatim with that herein under consideration, said:

This prohibition was clearly intended to forbid voluntary disclosures, but it was never intended to prevent the disclosure of the contents of official documents pursuant to the compulsion of a subpoena where the contents of such documents are pertinent to a legal inquiry (*Bell v. Bankers Life and Casualty Co.*, 327 Ill. App. 321, 64 N.E. 2d 204. See also *ex rel State v. Church*, 35 Wash. 2d 170, 211 P. 2d 701; *State ex rel Haugland v. Smythe*, 25 Wash. 2d 161, 169 P. 2d 706, *Jones v. Giannola*, Mo., 252 S.W. 2d 660; *Powers, Attorney General ex rel Dept. of Employment Security v. Superior Court*, R.I., 82 A. 2d 885).

See also Wigmore on Evidence, 3rd Ed., Vol. 8, §2379, p. 801, wherein Professor Wigmore concludes that "any statute declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosures when needed in a court of justice."

In conclusion, by virtue of the authorities cited hereinbefore, the above question is, therefore, answered in the affirmative.

060-119—July 21, 1960

#### TAXATION

#### INTANGIBLE PERSONAL PROPERTY TAX—STOCK ISSUED BY FEDERAL INTERMEDIATE CREDIT BANKS—CH. 199, F.S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Is the Gainesville Production Credit Ass'n of Gainesville liable under Ch. 199, F. S., for payment of intangible personal property taxes on shares of "class B" stock that it owns in the federal intermediate credit bank of Columbia, S. C.?

The federal intermediate credit banks were created pursuant to authority granted by act of congress, §1021 et seq., title 12 U. S. code, and by §1111, title 12, USC, they have been granted the privileges of tax exemption accorded federal land banks and other national farm loan associations under §931, title 12 USC. Said title, §931, states as follows:

Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of Sections 761 and



781 of this title. First mortgages executed to Federal land banks, or to joint-stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation. July 17, 1916, c. 245, §26, 39 Stat. 380.

The production credit associations were created by act of congress, §1131 et seq., title 12 USC, and §1138(c) title 12 USC, grants them a tax exemption coupled with a provision for termination of said tax exemption. Said §1138(c), title 12 USC, states as follows:

The Central Bank for Cooperatives, and the Production Credit Associations, and Banks for Cooperatives, organized under this chapter, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds and other such obligations issued by such banks or associations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks or associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income *shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks or associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any production credit association or its property* (emphasis supplied) or income after the class A stock held in it by the Governor has been retired, or with respect to any bank for cooperatives or its property or income after the stock held in it by the United States has been retired. June 16, 1933, c. 98, Title VI, §63, 48 Stat. 267; Aug. 11, 1955, c. 785, Title II, §205, 69 Stat. 663; July 26, 1956, c. 741, Title I, §105(o), 70 Stat. 666.

These provisions pose the question of the right of this state to tax the stock mentioned in the above company, where the "class A" stock above-mentioned has been retired. If the stock were stock issued by a business corporation, it would seem to be subject to tax, under the above provisions. Does the fact that it was issued by a federal instrumentality make it exempt, notwithstanding the aforementioned provisions?

Inasmuch as the governor of the farm credit administration admittedly does not own any stock in the Gainesville association, *its property* clearly becomes taxable under the tax exemption termination provisions contained in the aforesaid §1138(c), title 12 USC.

Bouvier's law dictionary, unabridged, Rawles 3rd Ed., Vol. 2, p. 3139, defines "shares of stock as being universally considered to be personal property."

Webster's new collegiate dictionary, 2nd Ed., defines "its" as meaning "of or belonging to it."

Under the aforementioned definitions of "it" and "property," the shares of stock issued by the Federal Intermediate Credit bank of Columbia, S. C., are clearly *the property* of the Gainesville Production Credit Ass'n. In further support of this contention, Michie on Banks and Banking, Perm. Ed., Vol. 8, Ch. 19, §18, pp. 315, 316, states:

It is well established that shares of bank stock fall within the definition of property, and, as such, may be taxed in the hands of the shareholders. The exemption of the capital of a banking corporation does not, of necessity, include the exemption of shareholders on their shares of stock, and such shares are taxable without reference to the securities on which their value is based. (See cases cited under Footnotes 15, 16 & 17).

A tax on shares of stock, as the property of the stockholder, is to be distinguished from a tax on corporate property. As stated by the court in *Home Savings Bank v. Des Moines*:

The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *M'Culloch v. Maryland*, 4 Wheat 316; 4 L. Ed. 579, where in the opinion of Chief Justice Marshall, declaring a tax on the circulation of a branch bank of the United States beyond the power of the state of Maryland, it was said that the opinion did not extend "to a tax on the interest which the citizens of Maryland may hold in this institution. . . ." *Home Savings Bank v. Des Moines*, 205 U.S. 503, 518; 51 L. Ed. 901; 27 S. Ct. 571.

Inasmuch as the stock held by the Gainesville Production Credit Ass'n is, by virtue of the authority mentioned hereinabove, taxable, it will be necessary for the tax assessor to ascertain its full value. As a general proposition, the full cash value is ordinarily the market value, and "if there is no market value for the shares and no sales during the year, it is proper to assess it at the amount paid in, in the absence of any evidence as to their value" (*Fletcher Cyclopaedia Corp.* Perm. Ed., Vol. 14, §7005, pp. 887, 888 and 889).

In conclusion, by virtue of the authorities mentioned hereinbefore, the above question is, therefore, answered in the affirmative.

060-120—July 27, 1960

#### LEGISLATION

EFFECT OF 1960 CENSUS ON §§34.20 AND 34.21, F. S.—  
APPLICATION OF §11.031(3), (4), F. S.

To: *Sherman N. Smith, Attorney at Law, Vero Beach*

#### QUESTIONS:

1. What effect will the 1960 federal census have upon population acts in view of the provisions of §11.031 (3)(4), F. S.?

2. Are the provisions of §11.031(3)(4), F. S., applicable to §§34.20 and 34.21, F. S.? Will the application of §11.031 cause all acts to which it is applied to be unconstitutional?

AS TO QUESTION 1:

Section 11.031 (3), (4), *supra*, was enacted by the 1959 legis-

lature. Section 11.031 (3), *supra*, provides as follows:

The last federal decennial state-wide census shall not be effective for the purpose of affecting *acts of the legislature* enacted prior thereto which apply only to counties of the state within a stated population bracket until July 1 of the year following the taking of such census. (Emphasis supplied.)

Section 11.031 (4), *supra*, provides as follows:

From and after the time of the 1960 federal decennial census is officially announced the population brackets of existing *population acts*, applying said acts to particular counties, are amended so that said acts shall thereafter relate to the same counties. To accomplish the mechanics of this amendment it shall be the duty of the attorney general, through his statutory revision division, to mathematically compute and certify to the secretary of state and to the board of county commissioners of each county or counties to which a *population act* pertains, a new population bracket for each of said population acts to accord with the figures of said 1960 federal decennial census so as to carry out the purpose of this amendatory act and confine said acts to the same counties to which they related prior to the 1960 federal decennial census. (Emphasis supplied.)

As indicated above, §11.031 (3) and (4), F. S., were passed at the same session of the legislature. Section 11.031 (4) was passed after §11.031 (3). (See Chs. 59-264 and 59-28, respectively.) Where statutes relating to the same subject matter are passed at the same session of the legislature, they will be considered in *pari materia* and will be construed where each will be effective, if that is possible; but, when they are repugnant, the last one enacted will control (Provident Life and Acc. Ins. Co. of Chattanooga, Tenn., v. Mathers, 157 Fla. 661, 26 So. 2d 814).

Anticipating the difficulty and confusion arising from the introduction of the new census figures in that cities and counties affected by such census would either grow or shrink out of their presently existing population acts, the legislature enacted §11.031 (3) (4). It was apparently intended by the legislature that the passage of §11.031 (3), *supra*, would help to remove the difficulty and confusion created by the application of the new census by postponing the effect of the new census upon population acts until July 1, 1961, in order to permit counties and cities affected by said census to introduce legislation remedying any undesirable consequence of growing into or shrinking out of a prior existing population act. However, with the passage of §11.031 (4), *supra*, the practical necessity of postponing the operation of the new census has been obviated. Subsection (4) now authorizes the attorney general's office to re-compute population brackets following the census, and place the cities or counties affected thereby back into their correct categories and thereby continue the application of the previously existing population acts to the same cities or counties to which they related prior to the release of the 1960 census.

As indicated above, subsection (4) having been passed after subsection (3), the provisions of said subsection (4) will control so that it is no longer necessary for counties and cities affected by

the new census to introduce legislation correcting any population change unless they wish to do so in specific cases. It is my belief that the only effect that subsection (3) will have is merely to afford the attorney general ample time in which to make the changes in the present population acts as contemplated by subsection (4).

Your question is answered accordingly.

#### AS TO QUESTION 2:

Section 34.20, *supra*, provides that the salary of the judge of the county court shall be \$1,800 per annum; however, that this salary provision will not apply to any county having a population of more than 24,000 inhabitants according to the latest federal census.

According to the 1950 census, the population of Indian River county was 11,872; however, as you indicate the tentative 1960 census figures place the Indian River county population in excess of 24,000.

Under the provisions of §34.21, F. S., the salary of the judge of the county court in counties having a population in excess of 22,000 inhabitants is set at \$1,200 per annum.

Since both §§34.20 and 34.21 relate to the same subject matter and have the same general purpose, they are in *pari materia* and may be read together as constituting one law (*Amos, Comptroller, v. Conkling, et al*, 99 Fla. 206, 126 So. 283). Said sections, therefore, constitute one general law with a state-wide application for all counties except that the salaries for county court judges in counties below a certain stated population figure will be compensated in a manner differing from counties above that population figure. The important point is that all counties are affected by §§34.20 and 34.21, *supra*, except where a special law is in existence. As such, §§34.20 and 34.21 are not true "population acts" within the generally accepted usage of that term in that the operation of said sections is not confined to one particular county or at least to a small number of counties. (See *Board of Public Instr., Pinellas County, v. County Budget Com., et al*, 90 So. 2d 707; *State v. Dade County*, 27 So. 2d 283, *Crandon et al v. Hazlett*, 26 So. 2d 638.)

Examining the application of the provisions of §11.031 (3) (4), *supra*, it is clear from the wording of said subsections that it was the intent of the legislature that said subsection will apply to "population acts" containing "population brackets," which latter acts apply to counties within the stated brackets *rather than* to acts which have a state-wide application as illustrated by §§34.20 and 34.21, *supra*.

In regard to your inquiry relating to the constitutionality of §11.031 (4), it has been the established policy of my office to refrain from commenting on the constitutionality of statutes, as this is solely a court function. However, it should be noted that it is a fundamental precept of constitutional law that acts of the legislature are presumed to be constitutional, and I am not aware of any constitutional inhibitions that would render §11.031 (4) unconstitutional.

In passing, I feel I should mention that I fail to understand how it is possible to predicate an assumption of unconstitutionality of population bracket acts because of the application of §11.031 (4), based upon §21 Art. III, State Const. Section 21, Art. III applies to local acts and not to general laws, which, presumably, population



bracket acts are. If a population act is, in fact, a local act, it is unconstitutional in itself regardless of the application of §11.031 (4). In my view, §11.031 (4) will neither help nor hurt the constitutionality of a local act disguised as a population law.

In light of the above statements, your question is answered as follows:

It is my opinion that §11.031 (3) (4), F. S., will not affect the provisions of §§34.20 and 34.21, F. S., and that the salary of the judge of the county court (of Indian River county) will remain at \$1,800 per annum as fixed by §34.20 until the official announcement of the 1960 federal census, at which time the salary of said judge will be governed by the provisions of §34.21, assuming that there has been a population increase.

060-121—July 27, 1960

Supersedes Question 4,

059-247—p. 388

### INSURANCE

INSURANCE CODE—MUNICIPALITIES—COUNTIES—  
LICENSES, LICENSE TAXES—§§175.05, 175.07, 175.11,  
185.08, 205.02, 323.07, 323.15, 440.51, 624.0300 (3), 624.0305,  
624.0318, CHS. 4322, 1895; 5106, 1903; 6421, 1913;  
14491, 1929; 18011, 1937; 19112, 1939; 20956,  
1941; 29615, 1955; AND 59-205

To: J. Edwin Larson, Insurance Commissioner, Tallahassee  
QUESTION:

**Are municipalities and other political subdivisions precluded from exacting occupational license taxes conditional upon the insurer transacting business within the boundaries of said municipality or other political subdivision?**

This question raises the question of the continued application of §§175.05, 185.08 and 205.02, F.S., to insurers doing business within municipalities and other political subdivisions of this state. Section 175.05 authorizes municipal corporations, having firemen's relief and pension funds, to levy and impose premium taxes against insurers for the use and benefit of such firemen's relief and pension funds; the continued application of this section having been brought in issue by that portion of §92 of the Florida insurance code of 1959 (Ch. 59-205) preempting "the field of imposing excise, privilege, franchise, income, license, permit, registration and similar taxes . . . as measured by premiums, income or volume of transactions," to the state itself. (Emphasis supplied.)

Section 185.08, F.S., provides the same authority for municipal corporations in connection with policemen's relief and pension funds and all comments made herein applying to the firemen's relief and pension funds are equally applicable to such policemen's relief and pension funds.

Section 205.02, F.S., authorizes license taxes against insurers, by counties and municipal corporations, equal in amount to 50% of the state tax levied; unless this section, insofar as it relates to insurers, has been repealed by said §92, Florida insurance code of 1959, which, insofar as here material, provides that "nor shall any such county, city, municipality, district, school district, or political

subdivision or agency require of any such insurer . . . duly authorized or licensed as such under this code, *any additional authorization, license or permit of any kind* for conducting therein transactions otherwise lawful under the authority or license granted under this code." Except for §92 of the insurance code (§624.0318, F. S.) said §175.05 and 205.02, F. S. would be applicable to the occupational license taxes imposed by said §74(3) of the insurance code.

*The premium taxes imposed by municipalities*, for their firemen's relief and pension funds, under and pursuant to said §175.05, are earmarked, and must be used exclusively for such purpose (Miami v. Carter, Fla., 105 So. 2d 5; Jackson v. McGrath, 155 Fla. 565, 20 So. 2d 907). They are, in a broad sense, trust funds earmarked for the municipality's firemen's relief and pension fund. Said §175.05 authorizes municipal corporations, having firemen's relief and pension funds, established pursuant to Ch. 175, F. S., to levy a 1% premium tax on premiums paid on insurance business done within such municipalities, for which the insurers receive credit against the premium taxes imposed by the state. The premiums imposed and collected pursuant to said §175.05 are earmarked by §175.07, F. S., for firemen's relief and pension funds, or the relief and pension fund for firemen and policemen, where the latter fund exists. Section 175.11 sets out the person entitled to benefits from such funds, and such fund must be used exclusively for such purposes and none other (Miami v. Carter, Fla., 105 So. 2d 5; Jackson v. McGrath, 155 Fla. 565, 20 So. 2d 907). These funds may not be diverted to other purposes (§175.05 and 175.07, F. S.; Miami v. Carter, supra; Jackson v. McGrath, supra). Chapter 29615, 1955, which made many changes and amendments in the insurance laws of Florida, provided that nothing therein was to be construed as repealing either §175.05 or §440.51, F. S.

*The question of the repeal of §175.05* arises because of the provision in §92 of the insurance code (§624.0318, F. S.) that "the state of Florida hereby preempts the field of imposing excise, franchise, income, license, permit, registration and similar taxes, licenses and fees upon insurers and their agents and other representatives as such, *as measured by premiums, income or volume of transactions*, or in any other similar manner." (Emphasis supplied.) This provision does not seem to extend to license taxes imposed in fixed amounts, such as that imposed by §74(3) of the insurance code (§624.0300, F. S.).

*The question of the repeal of §205.02* arises because of the provision in the latter part of §92(1) of the insurance code (§624.0318, F. S.), which provides in substance that no municipality may require of any insurer, duly authorized and licensed under and pursuant to the Florida insurance code of 1959, "any additional authorization, license or permit of any kind for conducting therein transactions otherwise lawful under the authority or license granted under this code." (Emphasis supplied.)

*Construction of statutes, rules, etc.*—"Most of the various rules or principles for the construction of statutes are designed to subserve one important object, namely, to ascertain the legislative will and to carry that intent into effect to the fullest degree. To this principle, all rules of statutory construction are subordinate. The legislative intent is the polar star by which the courts must be guided, since it is the essential and vital force behind the

law" (30 Fla. Jur. 172-173, §73). Where the phraseology of a statute is ambiguous or susceptible of more than one interpretation the court should glean the legislative intent from "the evil to be corrected, the language of the act, *including the title*, the history of the enactment and the state of the law already in existence bearing upon the subject" (emphasis supplied) (Foley v. State, Fla., 50 So. 2d 179, text 184; Curry v. Lehman, 55 Fla. 847, 47 So. 18, text 20). Although §816 of the said insurance code expressly repeals numerous sections of Florida Statutes, no mention is made of either §175.05 or §205.02, F. S. No one would be expressly notified, by reading the title to the insurance code, that any change was to be made in either §175.05 or §205.02, F. S. Although matters properly connected with the subject of a legislative act or statute need not be mentioned in the title, *its purpose is to give such notice of the contents of the act as to lead to inquiry of its contents by those interested* (State v. Barnes, 119 Fla. 405, 161 So. 568, text 570). "If the title of an act fairly gives notice of the subject of the act so as to reasonably lead to inquiry into the body of the act," it will be deemed sufficient (Butler v. Perry, 67 Fla. 405, 66 So. 150, text 152; see also Foley v. State, supra).

Let us examine the phrase "*authorization, license or permit*," used in §92 of the insurance code (§624.0318, F. S.), for the purpose of determining whether the reference is to *regulatory authorization, license or permit*, or to taxes for revenue purposes. It is stated in 53 C. J. S. 451, §3, that "the terms 'license' and 'license fee' have definite and distinct meanings although they are often indiscriminately used without distinction from related exactions on occupations and privileges . . . . There is, however, properly speaking and as generally understood, a clear distinction between a license granted or required as a condition precedent before a certain occupation or business can be carried on and a tax assessed on the occupation or business in which such license may authorize one to engage and a license fee or license taxes and ordinary taxes, although both in the statutes and in the decision of the courts this distinction is frequently disregarded, and it is sometimes difficult to determine whether a sum paid is a license fee or a tax." A license fee is one exacted under the police power for regulatory purposes and a license tax is one exacted under the taxing power for revenue purposes (53 C. J. S. 452 and 453, §3). "A license imposition upon a business or occupation which is *not* one calling for police regulation is a revenue tax. However, a license enactment is a tax when, and only when, revenue is the main purpose for which it is imposed. In general, therefore, where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax." (Emphasis supplied.) (33 Am. Jur. 340 and 341, §19).

In this connection see also Moots v. Trenton, 358 Mo. 273, 214 S. W. 2d 31, text 34; Viquesney v. Kansas City, 305 Mo. 488, 266 S. W. 700, text 702; Black v. Cinquegrani, 163 Pa. Super. 157, 60 A. 2d 898, text 900; Pa. Liquor Control Bd. v. Publicker Commercial Alcohol Co., 347 Pa. 555, 32 A. 2d 914, text 917; Solberg v. Davenport, 211 Iowa 612, 232 N. W. 477, text 480. See also 25

Words and Phrases 181, distinguishing license and tax, all in accord with the above. Section 74 of the said insurance code imposes both license fees and license taxes, the state license taxes being paid into the general revenue fund, and the license fees being paid into the agencies or the trust fund in the state treasury. These observations pose the question of whether the phrase "any additional *authorization, license or permit of any kind* for conducting therein transactions otherwise lawful under the authority or license granted under this code," has reference to license taxes within the purview of §205.02, F. S., or regulatory licenses, not within said section, for which license fees may be charged, under the regulatory provisions of the insurance code. These observations show that the last above quoted phrase is ambiguous, raising the question of whether *regulatory licenses*, as distinguished from *revenue license taxes*, are contemplated. If revenue licenses and license taxes are contemplated, then there would appear to be a possible conflict between said §92 of the insurance code and §205.02, F. S.; but if, on the other hand, regulatory licenses, and not revenue license taxes, were intended then there is no conflict and §205.02 stands and remains in force and effect.

*Florida insurance code of 1959, a revision, etc.*—An examination of the title and body of the Florida insurance code of 1959 (Ch. 59-205) reveals that it was a consolidation, revision and codification of existing insurance laws of Florida, although additions and subtractions in some fields appear to have been made; the title stating that the said act provides "a comprehensive revision, consolidation and classification of the insurance laws of the state of Florida." "Where the meaning of the language of a revision or code is plain and unambiguous, it must be construed without resort to the original statutes which have been brought into it;" however, where it becomes necessary to construe doubtful language in the revision, "the original acts may be consulted to determine the meaning intended." (82 C. J. S. 907, §385). *The title to said chapter 59-205*, although it recites the repeal of numerous sections of Florida Statutes, makes no mention of said §205.02, F. S.; also makes no mention of *laws and parts of laws in conflict*. The body of the act likewise repeals the sections mentioned in the title aforesaid (not including §§175.05 and 205.02) but makes no mention of laws and parts of laws in conflict. No one would, by reading the said title, be led to feel that it in any way affected said §§175.05 and 205.02, F. S.

*An examination of the history of said §175.05*, reveals that it was derived from §5, Ch. 19112, 1939, so that it had been in force in this state for about 20 years when the Florida insurance code of 1959 was adopted. Many firemen's relief and pension funds, and other funds within the purview of Ch. 175, F. S., have been established, which are largely dependent on the premium taxes provided for and imposed by said §175.05, F. S. It is apparent from §175.05, F. S., that similar pension funds existed through other statutes or laws in six or more of the larger cities at the time of the enactment of said Ch. 19112 in 1939. If the legislature, by §92 of the Florida insurance code of 1959, intended to repeal by implication said §175.05, F. S., then the impact of the repeal on existing firemen's relief and pension funds, as well as other funds within said Ch. 175, F. S., will be considerable and may require resort to considerable additional local taxation in order to carry



such pension funds. Repeals by implication are not favored by the courts (82 C. J. S. 479, §288; *Parker v. Jacksonville, Fla.*, 82 So. 2d 131, text 133). "It will be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject; and where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption, or the latter statute revises the whole subject matter of the former. Where a statute expressly repeals specified acts, there is a presumption that it was not intended to repeal others not specified. In such case there is an implied approval of the statutes not specified, as well as evidence of an intention to leave them undisturbed, and the doctrine of implied repeal does not apply." (*American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524, text 532; 82 C. J. S. 487, §289). "The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intent to do so." (*De Coningh v. Daytona Beach, Fla. App.*, 103 So. 2d 233, text 236, quoting from *State v. Simpson*, 94 Fla. 789, 114 So. 542, text 543).

An examination of the history of said §205.02, reveals that such a provision has been in the statutes and laws of Florida for more than 60 years (§9, Ch. 4322, 1895; §2, Ch. 5106, 1903; §2, Ch. 6421, 1913; §2, Ch. 14491, 1929; §2, Ch. 18011, 1937; and §2, Ch. 20956, 1941), and was in force and effect at the time of the adoption and enactment of the said Florida insurance code of 1959. There being no express repeal of said §205.02, in so far as it relates to insurance companies, has the legislature otherwise evidenced an intention that said section shall no longer remain in full force and effect? As above demonstrated there is doubt that the phrase above mentioned prohibiting the requiring by municipalities of "*any additional authorization, license or permit of any kind. . .*" (emphasis supplied) relates to license taxes for revenue purposes. Such phrase may have been intended to bar any attempt locally to regulate the conducting of an insurance business and not to prohibit license taxes for insurance purposes. The "preemption" of the field of imposing excise, privilege, franchise, income, license and other taxes, mentioned in the first clause of §92 of the said insurance code, is limited to those taxes measured "*by premiums, income or volume of transaction or in any other similar manner,*" (emphasis supplied) this does not seem to extend to license taxes imposed in specified amounts. From these observations it is evident that the latter part of the first paragraph of §92 of the insurance code is ambiguous and requires construction.

In *Cullman v. Farmers Market and Exchange Ass'n*, 256 Ala. 315, 54 So. 2d 586, text 588, it was held that a "permit fee" authorizing an association to deal in farm merchandise for the benefit of its members, was not "a privilege, license or other tax." The terms "authorization," including authority and authorize (4 Words and Phrases, 830, et seq.), and "permit," including permission (32 Words and Phrases, 209, et seq.), seem to relate to authority granted, and not to public revenues or taxes; the meaning of the term "license" has been hereinabove considered. The words "authorization, license or permit" are used in the statute; "the connection in which words and phrases are used in statutes affect

their meaning. They are not construed singly, but should be given such meaning as is required by the context. In accordance with the rule or maxim of *noscitur a sociis*, which is to the effect that the meaning of doubtful words may be ascertained by reference to the meaning of words associated with it, words employed in a statute are construed in connection with, and their meaning is ascertained by reference to, the words and phrases with which they are associated or related." (82 C. J. S. 654 and 655, §331; see also *Dunham v. State*, 140 Fla. 754, 192 So. 324, text 326). These authorities cast doubt on a construction of the word "license" as used in the above quoted phrase of §92 of the insurance code, as extending to license taxes for revenue purposes. Taking into consideration its association with the words "authorization" and "permit" the more reasonable construction would seem to be a "license" in the regulatory sense as distinguished from license taxes for revenue purposes.

*As a general rule, statutes are construed to operate retrospectively*, unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts, or by necessary and unavoidable operation (82 C. J. S. 981, §414). To construe §92 of the insurance code (§624.0318, F. S.) as operating prospectively, and not retrospectively, thereby protecting existing firemen's relief and pension funds, would avoid constitutional questions; if the section is to be held to prohibit further levy of premiums taxes by municipalities. The insurance code (see latter sentence of §79 of the insurance code; §624.0305, F. S.,) indicates an intention to permit the levy of licenses and license taxes by counties and municipalities only on insurers, solicitors and agents maintaining offices, places of business, or residences within the county or municipality imposing the license tax.

*Conclusion.*—There is doubt that §92 of the Florida insurance code (§624.0318, F. S.) was intended to operate retrospectively or retroactively so as to prohibit the continued levy of premium taxes by municipalities having and maintaining firemen's relief and pension funds, and similar funds, within the purview of Ch. 175, F. S., under §175.05, F. S., there being nothing in the said insurance code indicating a clear intent on the part of the legislature to make the said code retroactive as to existing pension funds. There is, also, by reason of the failure of the title to the said code to give notice of an intention to repeal §§175.05, 185.08, as well as §205.02, F. S., some question of the effectiveness of any repeal of said sections in so far as they provide for the levy of taxes against insurers; however, this point goes to the constitutionality of the attempted repeals and will be left to the courts by this office.

In the recent decision of the Florida supreme court in *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So. 2d 170, a municipal ordinance requiring common carriers operating in this state under certificates of public convenience and necessity issued to them by the Florida railroad and public utilities commission, to pay an annual fee for the use of truck unloading areas on the public streets was held invalid as being contrary to the provisions of §§323.15 and 323.07, F. S. Although the language of §323.07, appears to be similar in intent to that set forth in §92, Ch. 59-205; i.e., "Any additional authorization, license or permit of any kind . . ." it should be especially noted that §323.07, F. S., unquestionably prohibits in clear and unequivocal language, a muni-

city from requiring a transportation common carrier to pay any license, fee or tax except as provided by Ch. 323, F. S. No such clearly expressed prohibition is to be found in §92, *supra*.

Thus, there is doubt that the reference "any additional authorization, license or permit of any kind," appearing in the latter part of §92(1), is to license taxes for revenue purposes, and the same appears to have been intended to prohibit attempts by local authorities to impose regulatory measures as such. A study of the said insurance code reveals a legislative intent to limit the imposition of license taxes to those municipalities and other political subdivisions wherein places of business are maintained, including residences used as headquarters or places of business.

In view of the statutory provisions, rules of statutory construction, legislative history and comments thereon hereinabove set forth, it would appear that the municipalities and other political subdivisions would be authorized to exact an occupational license tax from insurers transacting business within their boundaries, in an amount not in excess of \$100 per annum, which is one-half of the state license tax on insurers authorized by §74(3), Ch. 59-205, now appearing as §624.0300(3), F. S. (§205.02, F. S.)

This opinion supersedes the answer to question 4, as set forth in A. G. O. 059-247 p. 388, insofar as there exists a conflict between said answer and the holding of this opinion.

060-122—July 27, 1960

**INSURANCE**  
**GENERAL LINES AGENT'S LICENSE—ELIGIBILITY OF**  
**MINOR WHOSE NON-AGE DISABILITIES HAVE BEEN**  
**REMOVED—§§62.23 AND 625.0105, F. S.**

*To: J. Edwin Larson, State Treasurer and ex officio Insurance Commissioner, Tallahassee*

**QUESTION:**

May a minor who has obtained a court decree removing non-age disabilities be issued a general lines insurance agent's license?

Section 625.0105, F. S., pertaining to qualifications for general lines agent's insurance licenses, among other things, contains the following provision:

(1) that the applicant is a natural person of at least 21 years of age.

Judges of the several circuit courts of this state sitting in chancery are given the full power and authority to remove disabilities of non-age of all minors, male or female, over the age of 18 years (§62.23, F. S.).

On July 11, 1889, in the case of *State ex rel Lamson v. Baker*, 25 Fla. 598, 6 So. 445, the supreme court of Florida held that a male person over 18 years of age whose disabilities of minority have been removed, is entitled to be examined as to his qualifications to practice law, the same as if he were 21 years of age. The statute in effect at that time relating to the practice of law required that an applicant be 21 years of age.

In *State ex rel Curington v. Swope*, 34 So. 429, the Florida supreme court on March 12, 1948, reaffirmed the holding of the *Lansing* case, *supra*, in connection with the eligibility of a person

not yet 21 years of age, who had obtained a decree removing his disabilities of non-age to apply and to be examined as to his qualifications to become a real estate salesman.

It is my opinion that a natural person who has attained the age of 18 years and whose disabilities of non-age have been removed by the circuit court, is eligible, provided all other requirements of the insurance laws are complied with, to be licensed as a general lines insurance agent in this state.

060-123—July 28, 1960

**CRIMINAL PROCEDURE**  
**COUNTY ATTORNEY—CONVICTION FEE—PLEA OF**  
**GUILTY—§§125.04, 34.11 AND 937.05, F. S.**

To: *Dorothy Moore, Clerk Circuit Court, Hendry County, LaBelle*  
**QUESTIONS:**

1. What is the conviction fee for the prosecuting attorney employed by the board of county commissioners in connection with criminal prosecutions in the county judge's court?

2. Is such prosecuting attorney entitled to a conviction fee if a person charged with crime pleads guilty on first arraignment?

3. Is the board of county commissioners correct in assuming that on a plea of guilty the defendant is adjudged guilty and not convicted?

**AS TO QUESTION 1:**

Under the provisions of §125.04, F. S., the employed county prosecuting attorney handling cases before the county judge's court of Hendry county, in the absence of special or local legislation to the contrary, is entitled to the conviction fees as appear in §34.11, F. S.

**AS TO QUESTION 2:**

The answer to question 2 turns on whether a plea of guilty on a preliminary hearing in a county judge's court is legally a conviction. Section 937.05, F. S., in addition to other things, provides that "If the accused shall plead guilty to such charge, the justice of the peace" or, in this case, the judge of the county judge's court, "shall thereupon enter such plea upon his docket, give judgment upon same and enter such judgment upon his docket."

It is also a recognized aspect of criminal law that courts may entertain motions to withdraw a plea of guilty (*Eckles v. State*, 132 Fla. 526, 187 So. 764).

A conviction fee is allowable only when there is a "conviction"; a plea of guilty is not a conviction (*Timmons v. State*, 119 So. 393), because a conviction means an adjudication of guilt (*Weathers v. State*, 56 So. 2d 536).

Hence, question 2 is answered in the negative.

**AS TO QUESTION 3:**

Legally, a defendant is convicted when he is adjudged guilty and such adjudication of guilt may be based upon either a plea of guilty or a jury verdict of guilty. The statutory prerequisite to the payment of a conviction fee is that the defendant be convicted by being adjudged guilty and the right to such fee does not



depend on whether the conviction is based upon a guilty plea or a verdict of guilt.

Thus, question 3 is answered in the negative.

060-124—July 29, 1960

**CRIMINAL PROCEDURE**  
**INDETERMINATE SENTENCE—PREPARATION OF CLASSI-**  
**FICATION SUMMARY FOR PAROLE BOARD—COUNTY**  
**JAIL—§§921.17-921.23, AND 922.051, F. S.**

*To: Francis R. Bridges, Jr., Chairman, Florida Parole Commission, Tallahassee*

**QUESTION:**

When a defendant is given an indeterminate sentence to a county jail, upon whom does the duty rest to furnish to the parole commission the classification summary and progress reports which the indeterminate sentence law requires to be furnished to it?

The indeterminate sentence law is contained in §§921.17-921.23, F. S.

Section 921.17 lays down definitions of terms used in the indeterminate sentence law.

Section 921.18 specifies the circumstances under which an indeterminate sentence may be imposed, and it mandatorily requires that any such sentence shall be to the custody of the department of corrections (designated "division of corrections" by §965.01(1)(d)). It does not authorize an indeterminate sentence to a county jail, which is not a part of the state correctional system and is not under the jurisdiction of the department (division) of corrections.

Section 921.19 provides that in every case where a person is sentenced in accordance with the indeterminate sentence law, he shall be committed and conveyed to the custody of the department, and that upon arrival it will be the duty of the classification board of the department to determine in which correctional institution the prisoner will be confined.

Section 921.20 requires that, as soon as possible after the prisoner has been conveyed to the custody of the department, it will be the duty of the classification board to prepare a classification summary and furnish it to the parole commission for its use.

Section 921.21 requires that from time to time the department submit to the parole commission a progress report on the persons sentenced to serve indeterminate terms, with such recommendations as the department feels necessary to advise the commission on the prisoner's rehabilitation progress. This section also provides that when, in the opinion of the classification committee, based on its findings as provided by law, the ends of justice, the interests of society, and public welfare shall best be served, and with due regard to the deterrent effect of the example to others who may be like offenders, the said committee shall recommend to the parole commission and said commission shall have the power to either place the prisoner on parole or to finally discharge him from custody.

Section 921.22 provides that the parole commission, upon the

recommendation of the department, shall have the authority to determine the exact period of imprisonment to be served by defendants sentenced under the indeterminate sentence law.

Section 921.23 contains nothing pertinent to this discussion.

It is clear from the foregoing provisions of the indeterminate sentence law that it authorizes only indeterminate sentences to the custody of the department (division) of corrections, to be served in a state correctional institution, as distinguished from a county jail.

Did §922.051, which was enacted in 1959, have the effect of modifying the indeterminate sentence law so as to permit the imposition of indeterminate sentences to be served in county jails? Said statute reads as follows:

*922.051 Imprisonment in county jail; term of five years or less.*—Whenever punishment by imprisonment is prescribed, and said imprisonment is by statute expressly directed to be in a state prison, the court may, in its discretion in all cases where the sentence imposed is for a term of 5 years or less, direct that the imprisonment be in a county jail.

The said §922.051 does not mention indeterminate sentences and by its very terms excludes them from its application. It provides that "where the sentence imposed is for a *term* of 5 years or less," (emphasis supplied) the trial court may direct that the imprisonment be in the county jail. An indeterminate sentence is never for a *term of five years or less*; it is always for a *term of six months to five years (or some other maximum)*. Moreover, the title to Ch. 59-72, which later became §922.051, conveyed no hint of a legislative purpose to modify the effect of the indeterminate sentence law or to cause said Ch. 59-72 to apply to indeterminate sentences. I think that said §922.051 has no application to indeterminate sentences.

The purpose of said §922.051 was to give trial judges the option to sentence to either the state prison or to county jails defendants who, prior to the enactment thereof, would have been subject to imprisonment only in the state prison. Said statute shows on its face that it is intended to apply only to cases where the trial courts wish to impose sentences for terms of five years or less and where the "imprisonment is by statute expressly directed to be in a state prison." The robbery statute, §813.011, is an example of a statute which expressly directs that the imprisonment be in the state prison, since it provides for imprisonment only in the state prison; if it authorized imprisonment in either the state prison or the county jail, it would leave the place of imprisonment to the discretion of the trial court and would not expressly direct that the imprisonment be in the county jail and §922.051 could not be applied to robbery. The purpose of §922.051 was not to modify or affect the indeterminate sentence law or to make it applicable to county jail sentences.

Nor do I find any other statutory provision which authorizes indeterminate sentences to county jails.

It is my opinion that an indeterminate sentence to a county jail is not authorized by law and is an illegal sentence; that the only classification summary required by the indeterminate sentence law to be furnished the parole commission is one which is required of the classification board of the department (division) of cor-

rections upon its receipt of a defendant who is sentenced to the custody of said department (division) as required by law; that the only progress reports required by the indeterminate sentence law to be furnished the parole commission are those required of the department (division) of corrections with respect to persons sentenced to the custody of the department (division) as required by the indeterminate sentence law; and that the law imposes no duty upon anyone to furnish a classification summary and progress reports to the parole commission when a prisoner is illegally sentenced to serve an indeterminate sentence in the county jail, over which the department (division) of corrections has no jurisdiction.

060-125—July 29, 1960

### TAXATION

#### DOCUMENTARY STAMP TAXES—CERTIFICATES OF TITLE UNDER §702.02, F. S.—GOVERNMENTAL INSTRUMENTALITIES—§§201.01 AND 201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are certificates of title issued pursuant to §702.02, F. S., to the federal national mortgage association, as grantee, in connection with the foreclosure of a mortgage held by the association, subject to Florida documentary stamp tax?

Certificates of title, issued under and pursuant to §702.02, F. S., have been held to be generally within the purview of §3482, title 26, of the U. S. code and §201.02, F. S., and subject to both federal and state documentary stamp taxes (1953-4 A. G. O. 267; 053-207). The purchaser at the foreclosure sale and grantee under the certificate of title, being the federal national mortgage association, raises the question of its liability for the tax imposed by said §201.02, F. S. The federal national mortgage association is an agency or instrumentality of the U. S. (§§1716, et seq., title 12, U. S. code), and exempt from all taxation, other than taxes on its real property (§1723a, title 12, U. S. code).

"Neither the government, whether Federal or State, nor its agencies, are considered to be within the purview of a statute, unless an intention to include them is clearly manifested." This rule has been held applicable to statutes under which liabilities may appear to be imposed on the government through general language used (82 C. J. S. 554-556, §317). Governments and their agencies and instrumentalities are usually held to be exempt from taxation, in the absence of congressional consent (84 C. J. S. 393, 410, 492 and 494, §§207, 213, 256 and 259; 53 C. J. S. 614, §31). In so far as the above question concerns the federal national mortgage association it is not liable for documentary stamp taxes on the certificate of title issued to it in connection with the foreclosure of its mortgage.

Sections 201.01 and 201.02, F. S., impose a documentary stamp tax on "deeds, instruments or writings, whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or other person by his direction . . ." Under §201.01, F. S., this tax is imposed on "any person who makes, signs, executes,

issues, sells, removes, consigns, assigns or ships" such instruments within the state, *or for whose benefit the same may be made*, signed, executed, issued, sold, removed, consigned or shipped in the state. There is authority to the effect that a master's deed, made pursuant to a foreclosure deed, is in effect the deed of the mortgagor and conveys his interest in the mortgaged property (59 C. J. S. 1461, §772). This rule of law was doubtless the basis for §113.83(d) of the federal tax regulations, declaring deeds by masters in chancery, sheriffs, clerks of courts, etc., subject to taxation under the federal documentary stamp taxing statutes. However, such documentary stamp taxes may not be obligations of the federal national mortgage association, or be so imposed as to reduce the proceeds to which it may be entitled to under the foreclosure decree.

Although the documentary stamp taxes imposed by §§201.01 and 201.02, above mentioned, are the obligation of the mortgagor, the conveyance, having been made for his account, it may not reduce the claim of the mortgagee agent of the federal government. The tax being the obligation of the mortgagor, he is liable for the payment of the same, and such claim may be paid from any funds due and payable to the said mortgagor, if there be such after the payment of prior claims of or in connection with the said foreclosure.

These observations seem to answer the above stated question as well as a general answer may be given to the problem.

060-126—July 29, 1960

**REGULATION OF TRADE & COMMERCE**  
**TRADING STAMPS—EXCHANGE—REGISTRATION—**  
**§§559.01-559.06, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

**Does a person engaged in the business of exchanging, for a small consideration, stamps issued by one trading stamp company for those stamps issued by another such company, come within the purview of §§559.01-559.06, F. S., as being a trading stamp company, and as such required by said statutes to register and post bond?**

"Trading stamp company" is defined as meaning "any person engaged in distributing trading stamps for retail issuance by others, or in redeeming trading stamps for retailers in any way or under any guise." (Emphasis supplied.) (§559.01(2) F. S.).

Regulatory statutes such as the one herein under consideration should be liberally construed with a view to promote the object in the mind of the legislature. The obvious basic intention of the legislature in enacting §§559.01-06, F. S., was to protect the interested public as concerns the contractual obligation of trading stamp companies, who distribute stamps in this state for retail issuance by others, to redeem their stamps so distributed and issued.

Assuming that the business of X company is limited to exchanging, for housewives, brand Y stamps for brand Z stamps, both of which were originally distributed by companies Y and Z, it is my opinion that it could not be reasonably concluded that



said X company was in any manner *distributing* trading stamps for retail issuance by others, nor are they *redeeming* said stamps as we commonly understand the term "redeem," or as it is defined by Webster's new collegiate dictionary as meaning "to *regain* possession of by repurchase." (Emphasis supplied.)

In conclusion, insofar as concerns any business exchanging trading stamps in the manner indicated in the foregoing hypothetical situation, the above question is answered in the negative.

060-127—August 2, 1960

#### PUBLIC MONEY

TRAVEL EXPENSE—PURCHASE OF TRAVEL INSURANCE  
FROM PUBLIC FUNDS NOT AUTHORIZED—§112.061, F. S.

To: W. G. Hendricks, Business Manager, Board of Control,  
Tallahassee

#### QUESTION:

May the board of control pay from public funds for travel insurance for personnel on any official travel that takes them away from their official headquarters?

The board of control is not authorized to pay personal travel expenses except as authorized by the legislature.

The legislature has provided for the payment of per diem and traveling expenses of state officers and employees in §112.061, F. S. This act does not authorize payment of travel insurance premiums in addition to the designated amount of per diem allowed to reimburse the employee for his personal expenses. Travel insurance would be solely a personal benefit and not in the nature of an essential incidental expense incurred for the benefit of the state rather than the employee.

Your question is therefore answered in the negative.

060-128—August 3, 1960

#### BANKS AND BANKING

CONSTRUCTION OF §659.17(1), F. S., LIMITATION ON  
AMOUNT OF LOANS MADE TO DIRECTOR OR OFFICERS  
OF BANKING INSTITUTION MAKING LOAN

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are loans to partnerships, associations or corporations, in which bank directors or officers are interested, either directly or indirectly, subject to the limitations of §659.17(1) (a), F. S.?

Said §659.17, F. S., is a part of the Florida banking code of 1953 (Ch. 28016, 1953), and appears to have been derived primarily from former §§653.04, 653.18, 655.17 and 655.20, F. S. Although not referred to in its title or otherwise, said Ch. 28016, 1953 clearly appears to have been a consolidation, extension, revision and codification of the then existing statutes and laws relating to and regulating banks and trust companies in this state and their business. By comparison of said §659.17, F. S., or the Florida banking code of 1953, with §§653.04, 653.18, 655.17 and 655.20, former Florida Statutes, and other sections and parts of the said former Florida Statutes and laws, it becomes evident that

§659.17(1), was primarily derived from former §653.18, F. S. Section 659.17(1) (a) was clearly derived from former §653.18(1). Section 659.17(1) (b) was clearly derived from former §653.18(2) and (3). Much of said §659.17(1) (c), was derived from §653.18 (5). Section 659.17(1) (d)-(f) appear to be extensions of the said former §653.18, and relate to the manner of calculating the total liabilities mentioned in previous paragraphs of said §659.17(1).

The limitation now contained in §659.17(1) (a), originated in substantially its present form in Ch. 7269, 1917; however, said chapter contained no limitations on loans to other than directors or officers and corporations, partnerships and associations in which they were interested. The limitation upon loans to other than such bank officers and directors and their corporations, partnerships and associations appears to have originated with §10, Ch. 13576, 1929, amending §4151, R. G. S., 1920, which section was derived from said Ch. 7269, 1917. Said §4151, as amended by said 1929 act, provided in part that "it shall be unlawful to loan more than ten per cent of the combined capital and unimpaired surplus of any bank or trust company to any person, firm or corporation (*not an officer, director or employee*) until it shall have been approved by the board of directors. Provided, that where loans to customers of the institution (*not officers, directors or employees thereof*) are amply and entirely secured the ten per cent limitation may be increased to twenty-five per cent of the combined capital and surplus." (Emphasis supplied). The italicized portions of the said section remained unchanged in the Florida Statutes (§653.18), until the 1953 revision and codification of the banking laws of the state. These observations seem to indicate an exclusion of *bank officers, directors and employees* from former §653.18(2) and (3), F. S. Present §659.17(1) (b) appears to have been derived from these subsections of former §653.18, F. S. From these observations it seems that bank directors, officers and employees were not included in the phrase "any person, firm or corporation," as used in said §653.18(2) and (3), former Florida Statutes.

The question seems to arise from a reading of said §659.17(1), F. S., as to whether bank directors and officers are to be construed as being within the term "any person," as used in §659.17(1) (b), F. S. Definitions of the terms "officer" and "person," as used in the banking code, are set out in §658.02(11) and (12), F. S. These definitions give no indication that banking officers and directors are to be considered as persons within said §658.02(12). "Where the meaning of the language of a revision or code is plain and unambiguous, it must be construed without resort to the original statutes which have been brought into it; but, where necessary to construe doubtful language in the revision, the original acts may be consulted to determine the meaning intended. In other words, reference may be had to antecedent legislation only to solve a doubt, not to create one." (82 C. J. S. 907 and 908, §385; 50 Am. Jur. 464, §446). "It is settled rule of construction that where the entire legislation affecting a particular subject-matter has undergone revision and consolidation by codification the revised sections will be presumed to bear the same meaning as the original sections and will generally be so construed" (50 Am. Jur. 465, §46).

Doubtless the legislature, by §659.17, F. S. and prior statutes above mentioned, had in mind limiting the amount of loans that a banking institution may make either to its officers and directors

or to third parties, correspondence of past state comptrollers, as well as of the present state comptroller, indicates views of the comptroller in agreement with our above statement. The federal banking laws contain similar limitations (§§84 and 375a, title 12, U. S. code).

From the above and foregoing, we conclude that bank loans to directors and officers (see definition, §658.02(11), F. S.), individually, or to corporations, partnerships and associations in which they are directly or indirectly interested, are governed by §659.17 (1) (a), F. S.; and that loans to others are governed by paragraph (b) of the same subsection and sentence. The limitations contained in said paragraph have no application to bank officers and directors. Neither do paragraphs (d) and (e) of said subsection (1) have any application to officers and directors of a state banking institution. Where an officer or director of a banking institution is interested in a corporation, partnership or association, either directly or indirectly, loans to such corporation, partnership or association are under paragraph (a) of said subsection and section, and not other paragraphs of said subsection.

Therefore, the above stated question is answered in the affirmative. This seems to be true without regard to the quantum of the interest of such officer or director in such corporation, partnership or association.

060-129—August 3, 1960

#### BAIL BONDS

ENFORCEMENT—ATTORNEYS FEES UNAUTHORIZED FOR  
ATTORNEYS PAID BY GOVERNMENTAL  
UNITS—§627.0127, F. S.

To: Richard Gerstein, State Attorney, 11th Judicial Circuit, Miami  
QUESTION:

In a proceeding against a surety company to enforce a bail bond, are the state and its political subdivisions entitled to recover a reasonable sum as attorneys fees under the provisions of §627.0127, F. S.?

Section 627.0127, F. S., provides as follows:

Upon the rendition of a judgment or decree by any of the courts of this state *against an insurer in favor of an insured* or the named beneficiary under a policy or contract executed by the insurer, the trial judge shall adjudge or decree against the insurer and in favor of the insured or beneficiary, a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. Except, that without any prejudice or effect whatsoever as to suits relating to other kinds of insurance, no such attorney fee shall be allowed in any such suit based on a claim arising under a life insurance policy or annuity contract if such suit was commenced prior to expiration of sixty days after proof of the claim was duly filed with the insurer. Where so awarded compensation or fees of the attorney shall be included in the judgment or decree rendered in the case. (Emphasis supplied.)

You advise in your letter of inquiry that a substantial expense item in the operation of the state attorney's office for the 11th judicial circuit arises in connection with the enforcement of estreated bail bonds. You also advise that in your opinion the above-quoted section of the Florida Statutes appears to authorize recovery of a reasonable attorney's fee in connection with such enforcement proceedings.

Strictly speaking, a contract of guaranty or suretyship requires a principal, obligee, and a guarantor or surety, and it is a form of suretyship contract whereby the guarantor undertakes to protect the obligee against loss from the principal's failure to carry out his obligations. On the other hand, a contract of indemnity merely requires an indemnitor and an indemnitee, and it is one of insurance under which the indemnitor undertakes to save the indemnitee from loss arising from an unknown or contingent event. And the promise in an indemnity contract is an original, not a collateral, undertaking, while a *contract of guaranty is a secondary obligation, existing only where there is some principal or substantive liability to which it is collateral.* . . (emphasis supplied) (Insurance Law and Practice, Appleman, §5273, p. 64).

Examination of the legislative history of §627.0127, F. S., and of the holding of the Florida supreme court in the Phoenix Indemnity Co. v. Union Finance Co., 54 So. 2d 188, leaves serious doubt that the Florida supreme court would consider the section as extending the right to recover attorneys' fees to estreated bail bond enforcement proceedings. Your question is, therefore, answered in the negative.

060-130—August 8, 1960

#### TAXATION

PROPERTY OWNED AND USED FOR EDUCATIONAL PURPOSES—TAX EXEMPTION—§192.06, F. S., §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

**Is real property held and used by an individual as a site for the operation of a nursery school, or other school, entitled to exemption from ad valorem taxation?**

Section 1, Art. IX, State Const., as implemented by §192.06, F. S., provides exemption from ad valorem taxation for real property held and used exclusively for religious, scientific, municipal, educational, literary and charitable purposes. Section 16, Art. XVI, State Const., provides a like exemption for real property held and used exclusively for like purposes. The fact that such owner charges tuition, compensation for rooms and board, and other fees, resulting in some surplus and a livelihood for the owner, will not defeat the right to tax exemption, where such charges are incidental to the use of the property for educational purposes (Miami Battle Creek v. Lummus, 140 Fla. 718, 192 So. 211, text 217).

The case of Lummus v. Florida Adirondack School, 123 Fla. 832, 168 So. 232, was a proceeding to determine the tax exemption



status of the said school, which had been "organized under the statute providing for corporations for profit and its capital stock was fixed at one hundred shares of common stock of no par value," which school was in fact an adjunct to one in another state, and which was operated during a three months period in this state, with the pupils being given credit for their school work in this state. In this case the court remarked that "the constitution and statutes do not contemplate that the property of a corporation or of an educational institution which may be exempt from taxation shall be held, occupied or used for profit of any nature or extent, except that *which may be incidental* to the occupancy and use for educational purposes." (So. text 238). It is the property and not the corporate entity which is exempt from taxation, when used in accordance with the requirements of the constitution and statutes. The educational purposes must be the primary purpose and use of the property, with the profits, if any, being a mere incidental. The court further remarked (So. text 240) that "the earning of a livelihood or even a mere *incidental* surplus, if any, would not be deemed to effect a change in the purpose for which the private property was held and used by the individual or organization. The earnings were, and are, an incident to the performance of the service and are per se not a putting of the property to some use than that of an 'educational purpose.'" The court on the same day, in *Lummus v. Alice Ruth Ranson*, a widow, 123 Fla. 830, 168 So. 241, held property owned, held and used by Mrs. Ranson, as a private school, to be entitled to tax exemption. Mrs. Ranson had sold and transferred the school and school property to the Florida Adirondack School, Inc., *supra*.

In *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, the court seems to have recognized the right of real property, although owned by an individual and not a corporation, to taxation when such property is held and used exclusively for educational purposes, although the exemption there claimed was denied because the educational use was found not to be exclusive. In *Lummus v. Cushman*, Fla., 41 So. 2d 895, one Laura Cushman individually owned certain real property in Dade county, upon which she operated the Cushman school, during the usual school term, primarily this school taught primary school grades. The court, after holding that §1, Art. IX, State Const., as implemented by §192.06, F. S., was the controlling law, said that "under the pleadings and the evidence appearing in the record the plaintiff has established her contention that the property upon which she maintains and operates her school has been, and is now, actually occupied, held and used by her solely and exclusively for educational purposes." It was found by the court that such small profits as have been derived from the venture have been put back into the property for the maintenance and expansion of the school facilities, and future profits are to be used for such purpose, and that "the operation of the school tends to alleviate the crowded conditions obtaining in the public schools of Dade county; and the school has never been operated, nor will it be operated in the future, as a commercial project for the purpose of monetary gain to the plaintiff." Although not clearly appearing from the opinion in this case, doubtless Mrs. Cushman drew necessary living expenses and maintenance from the income of the school in the form of salary or otherwise; however, the primary

purpose was education, with the living expenses and maintenance of the owner mere incidental.

"It is essentially the purpose with which an institution is organized and operated that determines whether or not it is entitled to tax exemption as one not organized or conducted for pecuniary profit. Thus, the fact that a school actually realizes a profit does not necessarily preclude tax exemption, at least where such profit is never distributed to any individual . . ." (84 C. J. S. 568 and 569, §284). "The fact that an educational institution charges tuition fees," or makes a charge for board, or room and board, or compensates its teaching staff, "does not deprive it of a public or charitable character so as to preclude exemption . . ." (84 C. J. S. 568-570, §284).

Public schools of Florida, as recognized by §228.041, F. S., "consist of nursery schools and kindergarten classes; elementary and secondary school grades and special classes . . ." Private schools are recognized and regulated by Ch. 247, F. S., under which chapter minimum standards for such schools are fixed, which standards must be met if pupils of such schools are to be recognized as to educational standards of this chapter of the statutes.

The above question is, therefore, answered in the affirmative where the education of the pupils of such schools is the primary and main purpose and not profit, although an incidental profit will not of itself defeat the right to tax exemption.

060-131—August 9, 1960

#### TAXATION

DOCUMENTARY STAMP TAXES—ANNUITY FOR LIFE OR LIFE IN BEING—§§201.01 AND 201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Are annuity agreements, issued by nonprofit corporations to individuals in consideration of gifts or donations, subject to documentary stamp taxes in this state?
2. If question 1 is answered in the affirmative, how are the values of such annuity contracts to be determined?

A copy of the particular contract in question was furnished us with the said request for opinion. An examination of this contract reveals that in consideration of a gift or donation, made by a husband and wife, in the amount of \$20,000, the said nonprofit corporation made and executed to the said donors its written obligation to pay to them an annuity of \$1,000 annually so long as they, or either of them, shall live. Specifically, the grantor of said annuity agreement binds itself to pay to the donors the sum of \$1,000 annually "during the natural life of the said parties of the second part, or the survivor," the said annuity ceasing upon the death of the second parties.

The above mentioned contract is legally an annuity contract based upon the said gift as its consideration (*Barger v. French*, 122 Kan. 607, 253 P. 230, 50 A. L. R. 285; *Sherman v. American Congregational Ass'n*, 51 CCA 329, 113 Fed. 609; *Univ. of Vermont v. Wolf*, 105 Vt. 147, 163 A. 572, text 580; *Hartland v. Damon's Estate*, 103 Vt. 519, 156 A. 518, text 523; *Barr's Estate*, 104 Cal.

App. 506, 231 P. 2d 876; Wolfe v. Breman, 69 Ga. App. 813, 26 S. E. 633; Southern's Estate, 170 Miss. 805, 14 N. Y. S. 2d 509, text 511 and 512; 257 App. Div. 574, 14 N. Y. S. 2d 1; Hughes v. Sun Life Assurance Co., CCA Ill., 159 Fed. 2d 110, text 113; 3 C. J. S. 1374, §1, note 10; 76 C. J. S. 814, §51, note 45). In Wolf v. Breman, supra, the court said that "the typical case of an annuity is found where a purchaser pays down a lump sum to a grantor, who engages himself to pay a beneficiary during his life a stipulated sum annually."

The above mentioned document *is a written obligation*, of the St. Vincent de Paul society of Miami, a nonprofit corporation, *to pay money* to Finn Huttinger and Josephine Huttinger so long as they, or either of them, shall live, and is, therefore, within the purview of §§201.01 and 201.08, F. S., unless entitled to exemption therefrom. We are advised of no exemption from taxation for instruments of the nature of the one above described. The instrument being taxable, it is taxable at the rate of 10¢ per \$100 of the indebtedness or obligation evidenced thereby: What is the amount of the indebtedness or obligation of an annuity payable to a husband and wife during their lives, or the survivor of them? "In the absence of statute or rule making such a procedure improper, the value of life annuities may be computed by means of mortality or annuity tables . . . : But unusual vigor or frailty of constitution or health which may either lengthen or shorten the probable duration of the life on which the annuity depends should also be taken into consideration." (3 C. J. S. 1380, §4). This rule, as announced in said 3 C. J. S. 1380, §4, finds support in cases cited in Annotation in 81 A. L. R. 388-390; 99 A. L. R. 1180 and 1181; 102 A. L. R. 991-993, and 114 A. L. R. 1158-1161.

From the above and foregoing question 1 is answered in the affirmative. There being no statutes of this state controlling, the value of the annuity is to be determined in accordance with the above mentioned rule in 3 C. J. S. 1380, §4, based upon the life expectancy of both of the donees. Standard mortality and annuity tables should be used, with due consideration to the usual vigor or frailty of the constitution or health of the donees.

060-132—August 9, 1960

#### 1960 FEDERAL CENSUS

EFFECTIVE DATE AS TO LAWS AFFECTING MUNICIPALITIES—§§205.32, 205.38, 205.42, 1.01(9), 11.031(3), (4), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

When will the 1960 federal census figures become effective and operative as to §§205.32, 205.38 and 205.42, F. S.?

The 1960 federal census counted populations of the United States, the states, the counties, the municipalities, and other political subdivisions, as of April 1, 1960, so that from that standpoint the 1960 census may be said to have been effective from and after said April 1, 1960. License taxes under said §§205.32, 205.38 and 205.42, F. S., are controlled, as to amount, by the population of incorporated cities and towns, the license tax increasing as the population count increases, or decreasing as the population count

decreases. Section 1.01(9), F. S., provides that "reference to the population or number of inhabitants of any county, city, town, village, or other political subdivision of the state, shall be taken to be that as shown by the last preceding state or federal census." This provision is progressive, relating to successive federal censuses as they occur (*State v. Ferrell*, 130 Fla. 26, 177 So. 181, text 184). This office, by its opinion of Sept. 24, 1940, held that, in the absence of statutory provisions otherwise, federal censuses are effective from and after April 1 of the year of taking.

Section 11.031(3), F. S., provides that the "last federal decennial state-wide census shall not be effective for the purpose of affecting acts of the legislature enacted prior thereto *which apply only to counties of the state* within a stated population bracket until July 1 of the year following the taking of such census." (Emphasis supplied.) This subsection originated as a part of Ch. 59-28. Section 11.031(4), F. S., likewise seems to apply to population acts pertaining to *particular counties*. We, therefore, hold that said §11.031(3) and (4), have no application to municipal corporations, and are not controlling as to said §§205.32, 205.38 and 205.42, F. S., which relate to municipal corporations and not to counties, and do not delay the operation of population acts in so far as they may relate to municipal corporations.

Since there appears no reason for overruling our said opinion of Sept. 24, 1940, (1939-40 A. G. O. 531 and 532), we see no reason why reliable tentative population figures, issued by or procured from the bureau of the census, may not be used in determining license taxes under and pursuant to said §§205.32, 205.38 and 205.42, F. S., if such census figures are available.

060-133—August 10, 1960

Revises opinion 060-80, p. 562

#### TAXATION

ST. AUGUSTINE AIRPORT—FAIRCHILD ENGINE AND AIRPLANE CORP.—§1, ART. IX, §16, ART. XVI, §1, ART. VIII, STATE CONST., §192.06(1), (2), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Should the lands in St. Johns county, or any part thereof, known as the St. Augustine municipal airport, under lease to the Fairchild Engine and Airplane Corp., be subjected to ad valorem taxation?

The airport in question is owned by the city of St. Augustine, but is subject to that certain lease agreement by and between the said city and the Fairchild Engine and Airplane Corp., bearing date of Aug. 4, 1954, for a term of 10 years ending Aug. 4, 1964, with an option for an extension beyond said Aug. 4, 1964. The lease grants to the said Fairchild Engine and Airplane Corp. a 10 year leasehold interest in the lands described in deed book 212, at pp. 551, et seq., of the public records of St. Johns county, the same being the same lands described in deed book 169, at pp. 342, et seq., of the said public records of St. Johns county, less 21 acres, more or less. The said lands so leased are for the location of administrative offices of the said corporation, as well as other corporate exclusive or semi-exclusive use, including the use of the airport runways, ramps, etc., for airplane takeoffs, landings and



storage; subject, however, at all times to general airport use by the public, in the usual manner.

Under the terms of the second numbered paragraph of the lease "the lessee shall maintain the lands and premises in good operating condition, operate the airport for the use and benefit of the public; make available all airport facilities and services to the public without unjust discrimination; and refrain from imposing or levying excessive, discriminatory or otherwise unreasonable charges or fees for any proper use of the airport or its facilities or for any airport service. The lessee shall provide ground space, to the extent available, to others desiring to conduct aeronautical operations on the airport . . . nothing herein contained shall be construed to grant or authorize the granting of an exclusive right" to any person or persons to the exclusion of others in the same class (see §1622(g)(2)(C), title 50, U. S. code). It appears from the terms of the lease itself that there was no intention to exclude the air traveling public from the airport. The use by the public of the airport in the usual manner continues under the terms of the lease.

There has been brought to our attention the contention that the above described leased real property is not being used, nor has it been since the making and execution of the said lease been used, "exclusively for religious, scientific, municipal, educational, literary or charitable purposes," (§1, Art. IX, and §16, Art. XVI, State Const.), but is being used by the lessee corporation, a corporation for profit, as a factory facility in carrying out its corporate functions, powers and authority. The question of whether a parcel of real property is being held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, is largely a question of fact to be determined by the local taxing authorities. However, this office here holds that real property, unless otherwise specifically exempted from taxation by valid law, not "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," is subject to ad valorem taxation.

*Liability of the Fairchild Engine and Airplane Corp. for taxes.*—The title held by the Fairchild Engine and Airplane Corp., a business corporation, in and to the said lands is a leasehold interest for a period of 10 years, with a right to one or more 10 year renewals. So far as we are advised the said corporation is vested with no legal title to the said lands. Its interest is merely a term lease. The legal title, so far as we are advised, is vested in the city of St. Augustine, subject to certain rights, title and interests, reserved to the U. S. in its deed of conveyance of the property to the said city. For the purpose of this opinion we presume the legal title to the property in question to be vested in the city of St. Augustine. The title of the Fairchild Engine and Airplane Corp. is a leasehold interest for a term of 10 years, and deemed personal property and not real property (51 C. J. S. 531, 763, §§26 and 37; 32 Am. Jur. 39, §16). Leasehold interests in real property are not subject to taxation as such (Park-N-Shop, Inc., v. Sparkman, Fla., 99 So. 2d 571; Patrick Gardens, Inc., v. Nash, Fla., 100 So. 2d 626; Illinois Grain Corp. v. Schleman, Fla. App., 114 So. 2d 307), the statutes of the state making no provision for the assessment of leasehold interests as property (see above Florida cases), so that the *leasehold interest of the Fairchild Engine and*

*Airplane Corp. does not appear to be subject to ad valorem taxes as such.* This seems to be true although the use of the property is not held and used "for religious, scientific, municipal, educational, literary or charitable purposes."

*Liability of the municipality.*—Having reached the conclusion that, under the above mentioned Florida cases, that the leasehold interest of the Fairchild Engine and Airplane Corp. is not subject to taxation, we pass to the question of whether or not the interest held by the city of St. Augustine, that is the fee title, is subject to taxation. In *Park-N-Shop, Inc. v. Sparkman*, supra, the court remarked that "after a careful study of appropriate provisions of the Constitution and the statutes we decide that property of the state and of a county, which is a political subdivision of the state, Sec. 1, Article VIII, is *immune* from taxation, and we say this despite the references to such property in §192.06 (1) and (2), supra, as being exempt." Under §192.06(2), F. S., there is exempted from taxation "all public property of the several . . . cities, villages, towns . . . used or intended for public purposes . . . and including all property of municipally owned and operated public utilities held and used exclusively for municipal purposes." "It is a general rule that the exemption is determined by the use and ownership of the property and not altogether by the charter of the institution which owns and uses that property. *It is only property that is held and used exclusively for religious, scientific, municipal, literary and charitable purposes which may be exempt from taxation under the Constitution.*" (Emphasis supplied; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79).

Although, as to persons, firms and corporations, tax exemption is the exception and taxation the rule, with respect to municipal corporations the rule is otherwise. "Inasmuch as taxation of public property would necessarily involve other taxation for the payment of taxes so laid, such property is usually excluded by implication from the operation of laws imposing general taxation, unless there is a clear intent to include it." (*Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707, text 707). In this case the court remarked that "in this respect our statute, section 897, Compiled General Laws, 1927, (now §192.06, F. S.), in so far as it relates to cities and counties, is largely declaratory of the general rule independent of statute." In *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470, the "City of Panama City, on August 8, 1930, as owner of a certain tract of land entered into a written lease contract with the Southern Kraft Corporation, by the terms of which possession of certain lands was given to the Southern Kraft Corporation for a period of fifty years . . . and the option to purchase the land by the Kraft Corporation at any time within fifty years." Under the agreement the corporation and the city were to jointly construct certain public docks, the corporation further agreeing "to pay to the City of Panama City each year a guaranteed minimum of \$18,000 and to divide the net earnings on the docks in excess of \$18,000 a year in proportion to the amount contributed by the parties toward the cost of the construction thereof." Upon these facts the court held that the above property "was not being used for municipal purposes within the meaning of section 16, article XVI, of the constitution of Florida," but was being used purely for a private purpose. The court in this case did not discuss the effect of the use of the compensation paid by the corporation as con-

sideration for the lease, as it did in the later case of *Saunders v. Jacksonville*, 157 Fla. 240, 25 So. 2d 648 and 655.

In *Saunders v. Jacksonville*, supra, the city of Jacksonville, in Duval county, was, under contract, furnishing electric power to the city of Green Cove Springs, in Clay county, which was distributing the power purchased by it to its customers for a consideration. For the purpose of supplying the power to the city of Green Cove Springs the city of Jacksonville constructed necessary power lines and other equipment in Clay county to enable it to comply with its contract to furnish power to the city of Green Cove Springs. The tax assessor for Clay county made an assessment for ad valorem taxes against the properties of the city of Jacksonville in Clay county, the validity of which was involved in litigation by the city of Jacksonville. The opinion of the court in this case seems to have centered around the meaning of *municipal purpose* as used in §1, Art. IX, and §16, Art. XVI, State Const., being in part that "what constituted a purpose is a legislative question that should not be interfered with by the courts in the absence of a clear abuse of discretion. A municipal purpose is much broader in its scope than it was a generation ago . . . . The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and municipal purposes may now comprehend all activities essential to the health, morals, protection and welfare of the municipality." (25 So. 2d text 649 and 650). In *State v. Tallahassee*, 142 Fla. 476, 195 So. 402, the court approved the construction of an office building as a proper municipal enterprise, and in previous decisions approved airports, golf courses, school buildings, and other structures as proper for a municipal corporation to undertake (195 So. text 650).

In the *Saunders v. Jacksonville* case, Clay county contended that the sale of power to the city of Green Cove Springs was not a municipal purpose within the purview of §1, Art. IX, and §16, Art. XVI, State Const., but was a business enterprise; however, the court upheld the legislative act granting tax exemption to municipalities as to their utilities located in other counties. In this connection the court remarked that "it is a controlling factor that the owner of the property has no stockholders, or partners, and any income must necessarily accrue to the general public . . . . If the residents of the area within the city reap all the benefits then not only the county's theory is disapproved but the constitution makes no restrictions as to where they must be located to enjoy the exemption." Doubtless any income received by the city of St. Augustine from the Fairchild Engine and Airplane Corp. as rental of the property will necessarily accrue to the inhabitants and taxpayers of that city. This seems to have been one of the theories of the court in upholding the tax exemption statute involved in *Saunders v. Jacksonville*. In *State v. St. Johns*, 143 Fla. 544, 197 So. 131, text 134, the court remarked that "the constitution exempts from taxation, not municipal corporations as such, but property which is held and used exclusively by them for municipal purposes." "The fact that income is derived from the use of the property does not prevent the use being a public use or for public purposes, especially where the compensation received is paid into the city funds and used for administrative purposes . . . ." (84 C. J. S. 483-484, §254). The power plant of the city of Talla-

hassee, being located in Wakulla county, was placed upon the tax rolls of that county for the tax year of 1959; however, the circuit court, because of *Saunders v. City of Jacksonville*, held the same to be exempt from taxation, which holding has been appealed and is now pending in the appellate court.

From the above and foregoing it seems that, under *Park-N-Shop, Inc., v. Sparkman* case, the interest of the lessee (*Fairchild Engine and Airplane Corp.*) is not subject to taxation, so that the above question, in so far as it may relate to that interest, and the said engine and airplane corporation, should be answered in the negative. As to the title of the city of St. Augustine, unless such property be within *Saunders v. City of Jacksonville*, supra, it would seem to be subject to taxation, as not being used for municipal purposes. If not within *Saunders v. City of Jacksonville* the property would seem to be within *Panama City v. Pledger*, supra, and subject to taxation as property of the city of St. Augustine. Final determination of the taxability of the property, as the property of the city of St. Augustine, seems to be a judicial question to be finally determined by the courts. Should the county desire to test the question of the taxability of the property to the city of St. Augustine, it may cause the property to be entered on the tax rolls.

060-134—August 10, 1960

#### SHERIFFS

ATTORNEY'S FEES—FALSE ARRESTS—DEPUTIES—OBLIGATION OF SHERIFF'S OFFICE—§§30.49 AND 145.02, F. S.

To: *Florida Sheriffs Association, Tallahassee*

#### QUESTIONS:

1. Are attorney's fees, incurred in the defense of actions charging false arrests or false imprisonments against the sheriff, or one of his deputies, obligations of the sheriff's office or the county?

2. If question 1 is answered in the affirmative, what is the effect of a change in the incumbent of the sheriff's office?

As a general rule, sheriffs, as well as other officers, are civilly, but not criminally, liable for the acts and omissions of their deputies, where such acts are performed within the scope of the legal authority of the deputies and by virtue of their office (*Malone v. Howell*, 140 Fla. 693, 192 So. 224, text 226); such appointment conferring on such deputies "authority to make arrests only when the law authorizes arrests to be made. This is the extent of his authority and he cannot confer more than this." (*Malone v. Howell*, supra). The acts of a sheriff's deputy are to be imputed to the sheriff himself, when done by virtue of his office. The liability of the sheriff depends upon whether the acts of the deputy were done by virtue of his office as a deputy, "and in order to have that character it must be committed in an attempt to serve or execute a writ or process and as a means to that end, or in acting under a statute giving him the right to arrest without warrant." (*Swenson v. Cahoon*, 111 Fla. 788, 152 So. 203, text 204).

"The unlawful act of a deputy for which a sheriff or his sureties may be held liable are acts done 'by virtue of his office,'



while the acts for which the sheriff or his sureties may not be held liable are acts done 'under color of office.'" (Malone v. Howell, 140 Fla. 693, 192 So. 224, text 226; Walker v. U. S. Fidelity & Guaranty Co., Fla. App., 101 So. 2d 437, cert. den. 102 So. 728). See also 29 Fla. Jur. 327-329, §§86-88, and Florida authorities therein cited. "Peace officers have no right to arrest simply by virtue of their offices; their justification must depend on the fact that the arrest was made under circumstances warranted by law or on the issuance of valid process (35 C. J. S. 649, §22).

"To render the sheriff liable for the act of his deputy, the act must be done by virtue of his office as a deputy, and in order that it have that character it must be committed in an attempt to serve or execute a writ or process and as a means to that end, or in acting under a statute giving him the right to arrest without warrant, otherwise he is acting as an individual." (Roberts v. Dean, 133 Fla. 47, 187 So. 571, text 579; Swenson v. Cahoon, 111 Fla. 788, 152 So. 203, text 204). A sheriff is liable for the acts of his deputy performed within the scope of his legal authority and by virtue of his office (Holland v. Mayes, 155 Fla. 129, 19 So. 2d 709, text 710; Warren v. Hall, Fla., 66 So. 2d 230, text 231; Roberts v. Dean, 133 Fla. 47, 136 Fla. 421, 187 So. 571, text 579) but not for unlawful acts of such deputy done under a claim of color of office. The sheriff is liable for acts of his deputy done by virtue of his office but not those done under color or office (Walker v. U. S. Fidelity & Guaranty Co., Fla., App., 101 So. 2d 437, cert. den. 102 So. 2d 728; Malone v. Howell, 140 Fla. 693, 192 So. 224, text 226-228).

Under §30.49, F. S., a sheriff's office budget is required to "include the salaries and *expenses* of the sheriff's office, costs of operation of the county jail, purchase, maintenance and operation of equipment, including patrol cars, radio systems, transporting prisoners, court duties and all salaries, *expenses*, equipment and investigation expenditures of the entire sheriff's office for the previous year." Under §145.02, F. S., the net income of a sheriff's office, when under said section, is "the residue of the income of such office after deducting all reasonable expenditures for salaries of clerks and assistants and *the necessary expenditures* for the proper operation of said office." "As a general rule, a sheriff is not entitled, as a matter of right, to an allowance of attorney's fees incurred or paid by him for legal advice and services in connection with the discharge of his functions; but, under a statute entitling a sheriff to be reimbursed by the county for any expense incurred in the performance of his duty, a sheriff has been held entitled to reimbursement for reasonable and fair compensation paid by him to an attorney whose advice, counsel and assistance were necessary to the sheriff in the performance of his duty." (80 C. J. S. 537, §247). See also 47 Am. Jur. 890, §101 and Annotations in 26 A. L. R. 1311 and Ann. Cas. 1918 D 921-929, the latter annotation dealing with the phrase "necessary expense."

In Curtis v. Hulsizer, 5 N. J. Law 496, it was held that a constable may not recover the expenses of a suit brought against him for executing a writ of attachment *improperly*, or in an unlawful manner. In Way v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81, it was held that a sheriff was not entitled to reimbursement of attorneys fees incurred by him in defending an action against him for making a false return of process, such action not being done by virtue of

his office. These authorities, together with others above mentioned, lead to the conclusion that for a sheriff to be entitled to have attorneys fees incurred by him, or by his deputy, paid from office funds or from public funds, such expenses must have been incurred in defending actions done and performed by virtue of his office, within the scope of his legal authority and under circumstances warranted by law or pursuant to process valid on its face. Actions arising from acts of the sheriff, or of his deputies, done under claim of color of office only and in usurpation of authority not vested by law, are against them individually and not officially. Attorney's fees incurred in defending unlawful acts of the sheriff, or his deputy, are not deemed necessary expenditures of the office. However, errors made when acting by virtue of the office of sheriff may, when honestly made, are to be deemed acts done by virtue of office, so that necessary expenses incurred may be paid from office funds, when such funds are available.

Some authorities seem to hold that actions for false arrest and false imprisonment arise not out of actions done by virtue of office but through usurpation of unlawful power, so that expenses incurred in defending such actions are not expenses of the office. However, other authorities lean to the view that the term may extend to errors made when acting by virtue of the office, so that attorney's fees incurred in actions growing out of errors made in acts done by virtue of office may be paid from office funds, when available, but not when such actions grew out of usurpation of power, under color of office, not authorized by law. This gives a conditional answer to question 1; the answer in each case depending upon the facts and circumstances there involved.

Inasmuch as the facts and circumstances of each case are determinative of whether the sheriff's office should provide the legal defense for the deputy, it is suggested that the following procedure be followed: that upon the receipt of a complaint, the sheriff, with the aid of his legal advisor, or the county attorney, make a preliminary determination as to whether the deputy was acting within the scope of his legal authority. When, in the opinion of the sheriff and his legal advisor, the deputy was acting in good faith and apparently within the scope of his authority, the sheriff's office should, thereafter, undertake the deputy's legal defense.

Such an expense would be proper for the effective operation of the sheriff's department. It would be an expense incurred by the deputy in carrying out his duties for the protection of the county. It would be an expense necessary to maintain the efficiency and effectiveness of the office inasmuch as a deputy's discretion is sometimes arbitrarily invoked on an emergency basis. To fail to provide such protection may unduly hamper a deputy in the discharge of his duties.

Such an expense is one that should logically be allocated to the office of sheriff and not to the individual sheriff. All official trusts and duties pass to the success of a deceased sheriff. It is the duty of a new sheriff to complete the unfinished business left by his predecessor in office insofar as necessary where the business is not of such character that the retiring (or deceased) sheriff should complete it notwithstanding his having gone out of office. (See 80 C. J. S. 226, §51).

Therefore, the change in the incumbent of the office would not prevent the reimbursement of attorney's fees incurred if other-

wise payable under the rule discussed in question 1.

060-135—August 12, 1960

### LIENS

#### WRITS OF ATTACHMENT—PRIOR WRIT OF EXECUTION

To: *Ross E. Boyer, Sheriff, Sarasota County, Sarasota*

#### QUESTION:

When "A" docketts a writ of execution with the sheriff and the writ describes no property upon which the sheriff should levy, nor is any levy made by the sheriff, does a subsequent writ of attachment issued to "B" in which "B" describes specific personal property, and which property is levied upon by the sheriff, have priority over "A"'s writ of execution for the proceeds of the sale?

An attachment creates a lien on the attached property whether personalty or realty (*Pleasant Valley Farms and Morey Condensery Co. v. Carl*, 90 Fla. 420, 106 So. 427). However, an attachment lien does not become effective by issuance of the writ. It operates as a lien only from the time of the levy of the writ (*McClellan v. Solomon*, 23 Fla. 437, 2 So. 825).

An execution issued on a judgment is a lien upon the personal property of the defendant in execution *from the time such writ is delivered to the sheriff* (*Love v. Williams*, 4 Fla. 126; *Evins v. Gainesville Nat. Bank*, 85 So. 659).

Priority between attachment liens and other claims on the same property is generally covered by considerations as to priority in time. The right first acquired, as a rule, is superior (*Zinn v. Dzialynski*, 14 Fla. 187, Re: *Fuller*, 99 Fla. 1164, 128 So. 483).

In the instant case, the writ of execution issued upon the judgment became a lien from the time such writ was delivered to the sheriff, regardless of whether a levy was made under such writ, and such lien is superior in time to the lien created by the levy under the writ of attachment.

060-137—August 12, 1960

### MOTOR VEHICLES

#### FINANCIAL RESPONSIBILITY LAW—CH. 324, F. S. CONSTRUCTION OF §324.121(1) AND THE WORDS "OWNERS" AND "OPERATOR" AS USED IN SAID CHAPTER

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

#### QUESTIONS:

1. Does §324.121(1), F. S., extend to judgments against persons, firms and corporations, for damages arising out of the operation of motor vehicles owned and operated by others, under the rule of respondeat superior?

2. Does said subsection and section extend to non-profit associations and corporations operated for charitable, religious, educational and similar purposes?

3. Does said subsection and section extend to judgments for damages arising from accidents occurring on private property?

## AS TO QUESTION 1:

Section 324.121(1), F. S., provides that the state treasurer, as ex officio insurance commissioner, "upon the receipt of a certified copy of a judgment, shall forthwith suspend the license and registration, and any nonresident's operating privilege, of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section, and in §324.141." The exception provided for in §324.121(2) arises upon the consent of the judgment creditor, in writing, allowing the additional time for the payment of the judgment, and the exception under §324.141 arises upon action by the court permitting payment of the judgment by installments.

We are here considering the application of said §324.121(1) when there is no such extension. Section 324.121(1) when taken, considered and read out of context might indicate an affirmative answer to question 1; however, said subsection may not be so construed out of context, but must be construed in the light of the whole of said Ch. 324, *supra*. This method of construction finds support in the following.

In 82 C. J. S., 723-727, §348, it is stated that "the words, phrases and sentences of a statute are to be understood as used, not in any abstract sense, but with due regard to the context, and in that sense which best harmonizes with all other parts of the statute. In expounding one part of a statute, therefore, resort should be had to every other part, including parts which are unconstitutional or which have been repealed; and where one part of a statute is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all clauses harmonious." In 30 Fla. Jur. 214-215, §10, it is stated that "a statute should be construed in its entirety and as a whole. That is, the language in a particular provision of a statute is to be construed with reference to the statute of which it is a part. Significance and effect must, if possible, be accorded to every word, phrase and sentence and part of the statute. The different parts of a statute reflect light on each other. And statutory provisions are regarded in *pari materia* where they are parts of the same act. In respect to an act comprehending a certain subject, no specific section will necessarily stand alone." (See also 50 Am. Jur. 241-248, §§247-251; 30 Am. Jur. 215-220, §§111-220.)

Chapter 324, F. S., was derived by codification from Ch. 29963, 1955. When construing statutory revisions and codes, "in case of doubt and uncertainty as to the meaning of a provision of a code or of compiled or revised statutes, resort in ascertaining its true meaning may properly be had to the act from which the provision was derived, and the evils of the common law intended to be remedied thereby. This rule is particularly applicable where the code is not subject to a fair construction without consideration of the original statute. Indeed, it is a well settled rule of construction that where the entire legislation affecting a particular subject matter has undergone revision and consolidation by codification the revised sections will be presumed to bear the same meaning as the original section, and will generally be so construed," unless there appears a legislative intent to change the law in connection with the codification. (50 Am. Jur. 464-465,



§446.) "In considering a provision in a code or compilation, it is generally regarded as legitimate and proper to consider the title to the original act." (50 Am. Jur. 467, §449; see also Annotation in 37 A. L. R. 958.)

Turning to the title of Ch. 29963, from which Ch. 324, F. S., was derived, we find that such title makes reference to "an act relating to proof of financial responsibility of *owners and operators* of motor vehicles. . . . providing for suspension and revocation of licenses and motor vehicle registration and providing for other matters in connection with the financial responsibility of *owners and operators* of motor vehicles. . . ." (Emphasis supplied.) The theme of this title is the *financial responsibility of owners and operators of motor vehicles* in this state. In the first section of the act and chapter, it is stated to be the intent of the statute "to recognize the existing rights of all to own motor vehicles and to operate them on the public streets and highways in this state when such rights are used with due consideration for others," and "to promote safety and provide financial security by such *owners and operators* whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle, so it is required herein that the *owner and operator* of a motor vehicle involved in an accident shall respond for such damages and show proof of financial ability to respond for damages in future accidents as a requisite to his future exercise of such privileges." (Emphasis supplied.)

A reading and study of the entire chapter reveals a legislative intent to regulate owners and operators of motor vehicles in this state and to require financial responsibility of such owners and operators. The statute was not designed as one requiring the payment of all judgments by the judgment debtor, arising out of a motor vehicle accident, without regard to the judgment debtor's connection with the motor vehicle causing the damages represented by the judgment. Section 324.031, F. S., requires that "the *operator or owner* of a vehicle must prove his financial responsibility." References are made to owners and operators of motor vehicles in §§324.051, 324.071, 324.081, 324.101, 324.151, etc., F. S. The chapter is clearly directed toward owners and operators of motor vehicles, not judgment debtors. It is designed as a regulation of motor vehicles, their use on the public ways, and their owners and operators. There is no evidence that the statute was intended as more than a regulatory measure directed to owners and operators of motor vehicles on the public ways of the state. This seems to bring us to the question of who are owners and operators of motor vehicles within the purview of said Ch. 324, F. S., and especially §324.121(1) thereof.

The terms "operator" and "owner" of motor vehicles, as used in Ch. 324, F. S., are defined in §324.021, F. S.: The term "operator" as used in said statute, meaning, "every person who is in actual physical control of a motor vehicle," and the term "owner" as used in said statute, meaning "a person who holds the *legal title* of a motor vehicle, or, in the event a motor vehicle is the subject of an agreement for the *conditional sale or lease thereof*, with the right to purchase upon performance of the conditions stated in the agreement, and with an *immediate right of possession* vested in the conditional vendee or lessee, or in the event of a *mortgagor of a vehicle entitled to possession*, then such conditional

vendee, lessee, or mortgagor shall be deemed the owner for purposes of this chapter," (emphasis supplied) that is, Ch. 324, F. S. As used in said Ch. 324, the term "owner" extends only to three classes of motor vehicle owners: (1) the owner of the legal title, (2) the owner under a conditional sale or lease, and (3) a mortgagor in possession. "The legislature may define certain words used in a statute, or declare in the body of the act the construction to be placed thereon, and the court is bound by such definition or construction, and will apply it, in accordance with the judicial decisions on the question without enlarging or diminishing the meaning provided by the statute." (82 C. J. S. 536-538, §315.) Such statutory definition takes precedence and controls over all other definitions (30 Fla. Jur. 190, §89).

Section 324.121(1), F. S., being a part of Ch. 324, F. S., relates to judgments *against owners and operators of automobiles involved in injuries to others* resulting in judgments for damage, *not to other defendants* in such judgments indirectly responsible for the injury complained of and for which the judgment was entered. Persons liable under the rule of respondeat superior for injuries and damages caused by the operation of an automobile are not within §324.121(1), unless in law or equity they are deemed the owner or operator of such motor vehicle within the definitions of "owner" or "operator" above quoted and referred to. These observations answer question 1 in the negative.

#### AS TO QUESTION 2:

Question 2 raises the question of the application of said §324.121(1), F. S., to nonprofit associations and corporations operated for charitable, religious, educational and similar purposes. As used in said Ch. 324, F. S., the term "person" extends to "every natural person, firm, copartnership, association or corporation." We find nothing in said Ch. 324 exempting therefrom nonprofit associations and corporations. Motor vehicles operated by such nonprofit or charitable organizations over the highways and roads of this state are as much of a hazard and danger to the traveling public as vehicles operated by individuals or business partnerships or corporations.

Section 324.121(1) relates to judgments entered against owners and operators of motor vehicles; such judgments being entered by the courts in this state which, in the first instance, must determine the liability of the defendant whether such defendant be an individual or business or a nonprofit association or corporation. If a judgment against a nonprofit association or corporation is brought before the insurance commissioner, he must accept the same as such and may not question the liability of the judgment debtor as fixed by the court.

Section 324.121(1) is applicable to nonprofit associations and corporations as to judgments against them, when within the purview of said subsection. The conclusions reached in answer to question 1 would also be applicable to such nonprofit associations and corporations. Your question is therefore answered accordingly.

#### AS TO QUESTION 3:

Question 3 raises the question of the application of §324.121(1), F. S., to judgments for damages arising from accidents occurring on private property. Due to the common use by the public of private property such as entrances to drive-in theaters, parking lots adjacent to super markets and shopping centers and other private

areas opened to general use by the public, such property has become quasi public in nature. Although it has been held that traffic ordinances and state traffic laws are inapplicable to purely private property, the application of laws relating to law enforcement in quasi public areas has been upheld (See *People v. Garland*, 84 N. Y. S. 2d 72; *Grulich v. Paine*, 231 N. Y. 311, 132 N. E. 100). There are decisions in other jurisdictions which hold that where a private owner permits the public to use a street or way, he subjects such areas to all reasonable rules and regulations which are applicable to public streets (*Crossler v. Safeway Stores*, 51 Idaho 413; 6 Pac. 2d 151; 80 A. L. R. 463; *Nemours v. City of Clayton*, 237 Mo. App. 497, 175 S. W. 2d 60).

The primary purpose of Ch. 324, F. S., is the protection of the public from the hazards of motor vehicle operation. It is my opinion, in view of the above reasoning, that all the provisions of Ch. 324 (including §324.121(1), *supra*) should apply to private property which has become quasi public in nature as described above. This construction would appear to be consistent with the purposes of Ch. 324, and, until this precise question is settled by the courts of last resort of this state, question 3 should be answered in the affirmative.

060-138—August 12, 1960

**LIQUORS AND BEVERAGES**  
**ELIGIBILITY OF MAYOR AND CITY COMMISSIONER TO**  
**HOLD LIQUOR LICENSE UNDER §561.25, F. S.**

To: *L. Grant Peebles, Director, State Beverage Department,*  
*Tallahassee*

**QUESTION:**

**Are mayors and city commissioners prohibited from holding liquor licenses by virtue of §561.25, F. S.?**

Section 561.25, F. S., prohibits officers or employees of the state beverage department and sheriffs or other state, county or municipal officers with state police power granted by the legislature from engaging in the sale of alcoholic beverages under the state beverage law.

Your question must therefore be whether a mayor or city commissioner is a "municipal officer with state police power granted by the legislature," and if he is such an officer he would be prohibited from having any interest in any establishment holding a liquor license.

I respectfully direct your attention to A. G. O. 055-39, reported in the 1955-56 biennial report of the attorney general at p. 54, which reviews the various statutes in which the duties of police officers are outlined and concludes that same are those guardians of the public safety who are directly charged with the enforcement of the law, among whose duties are the prevention of the commission of crime, the detection of crime, and the disclosure of all information known by them which would lead to the apprehension and punishment of those who have transgressed the law.

In A. G. O. 053-311, reported in attorney general's 1953-54 biennial report, at p. 24, this office held that a deputy sheriff having all the powers of the sheriff except the power to appoint a deputy was an officer with state police power within the meaning of the statute.

In A. G. O. 058-16, reported in the 1957-58 report of the attorney general at p. 498, the intention and purpose of the subject statute was held to be to prohibit law enforcement officers from being licensed as dispensers of alcoholic beverages.

The term "police officer" has been held not to include city prison guards without the power to arrest (*City of Atlanta v. Bailey*, 29 S. E. 2d 514); neither does it include assessor of taxes (*Dibble v. Merriman*, 52 Conn. 214). The term "peace officer" has been held not to include judges of superior courts (*ex parte Abbey*, 237 P. 179; justice of the peace, *Satterwhite v. State*, 17 S. W. 2d 823); but includes those who are conservators of the peace who have the power to execute search warrants (*U. S. v. Viess*, 273 F. 279).

It will be noted that in many instances a mayor performs functions similar to a justice of the peace and a judge, and although both he and the city commissioner may perform functions which aid and assist in law enforcement, no cases are found which even by implication would include them within the classification of police officers, peace officers, or municipal officers with state police power granted by the legislature.

For the above reasons, your question is respectfully answered in the negative.

060-139—August 12, 1960

#### STATE PARKS

#### POLICING OF AREAS WITHIN CORPORATE LIMITS BY MUNICIPAL OFFICERS—§§592.09, 335.06 AND 901.15, F. S.

To: *Herbert Wm. Fishler, City Attorney, Fernandina Beach*

#### QUESTIONS:

1. May municipal police officers of the city of Fernandina Beach police that portion of the Fort Clinch state park lying within the corporate limits of the city?

2. May said officers make arrests within the park for violation of any ordinance of the city?

3. May the said officers erect traffic signs, speed signs and other regulations in the park area as is done in the city proper?

A large portion of the Fort Clinch state park is within the boundary limits of Fernandina Beach, and the park has built and maintains its own roads. The city police are now patrolling this area at the request of the park officials, and would like to ascertain whether or not the city of Fernandina Beach has the right and jurisdiction to carry out the functions listed in the above questions.

The legislature exercises plenary control over public highways, whether they be public state or county roads, or streets in municipalities (*Roney Inv. Co. v. Miami Beach*, 174 So. 26).

By §592.09, F. S., the state road department is authorized and directed to work in cooperation with the board of parks and historic memorials in constructing and maintaining roads, trails and bridges within and adjacent to state parks, and said section further provides that:

... The board (of parks and historic memorials) is vested with and shall exercise jurisdiction over the use of all such roads and trails lying within state parks . . . and shall



make and enforce reasonable rules and regulations regarding their use for travel.

Section 335.06, F. S. (The Florida highway code), authorizes the state road board to expend state road funds to construct and maintain roads within the boundaries of any lands within the state park system and further provides that:

(3) Such roads shall be located, relocated, constructed, reconstructed, and maintained, *numbered, marked and regulated in such manner as shall be agreed upon between the board and the Florida board of parks and historic memorials, and both boards are authorized to enter into such agreements.* (Emphasis supplied.)

It seems evident by the above statutes that the legislature intended that the state road department and the board of parks and historic memorials should be clothed with the primary jurisdiction to establish and enforce regulations pertaining to roads within the state parks.

However, there is nothing in the Florida constitution that prohibits the legislature from clothing municipal governments with legislative power to prohibit and punish by ordinance any act made penal by state laws, when perpetrated within municipal limits (Theisen v. McDavid, 16 So. 321).

In so far as any ordinances adopted by the city of Fernandina Beach are not in conflict with regulations adopted by the Florida board of parks and historic memorials and the state road department, it is my opinion that the municipal officers may enforce the ordinances in the part of the park located within the municipal boundaries.

This interpretation of the jurisdiction of the municipal police officers is in accord with my opinion 053-284, issued Oct. 22, 1953, wherein I held that lands comprising a state park and located wholly within the boundaries of a municipality were subject to the municipal zoning regulations.

In addition to the enforcement of the municipal ordinances, police officers may arrest for violations of the state law within the territorial limits of the municipality (§901.15, F. S.). In this event the officers making the arrest would have to turn the violators over to the county or state authorities for prosecution, as no municipal jurisdiction exists until a city ordinance proclaiming that type of violation a crime has been enacted (A. G. O. 055-24, Feb. 9, 1955).

#### AS TO QUESTIONS 1 AND 2:

The municipal police have jurisdiction to police that portion of the state park lying within the corporate limits of the city for violations of the state law or for violations of any valid ordinance of the municipality.

#### AS TO QUESTION 3:

Under §335.06, F. S., the authority to erect traffic signs, speed signs, and other regulatory signs is specifically delegated to the Florida board of parks and historic memorials and the state road department; accordingly, question 3 is answered in the negative.

060-140—August 17, 1960

**SHERIFFS**  
**APPOINTMENT OF A MINOR AS DEPUTY SHERIFF—**  
 §§62.23-62.26, F. S.

*To: John A. Madigan, Jr., Attorney, Florida Sheriffs Ass'n,  
 Tallahassee*

**QUESTIONS:**

1. May minors be appointed deputy sheriffs for the purpose of serving as life guards at a county beach?

2. If question 1 is answered in the negative, may they be eligible for such appointment after the removal of their disability by the circuit court?

**AS TO QUESTION 1:**

We find no Florida cases directly touching upon this proposition. As regards the principal, a deputy is in effect an agent and his actions are considered those of his principal (43 Am. Jur., Public Officers, §462; 67 C. J. S., §148). The case of *Blackburn v. Brorein*, 70 So. 2d 293 held that a deputy sheriff is an officer as distinguished from an employee. The case points out that a deputy may do anything his principal is empowered to do and is one for whose acts the principal is responsible.

At common law an infant may not hold an office where his duties may require the exercise of judgment and discretion; although he might hold a ministerial office (67 C. J. S., §17; 43 C. J. S., Infants, §24). However, in the absence of constitutional or statutory requirements, officers need not necessarily have the qualifications of electors (*State ex rel Attorney General v. George*, 23 Fla. 585, 3 So. 81).

Since a deputy performs other than purely ministerial duties, I must conclude that he is required to have attained his majority to hold office, inasmuch as a deputy has every power of the sheriff, excepting the power to appoint a deputy. See A. G. O. 055-166, July 20, 1955, wherein I held that a minor was not eligible to be appointed a deputy clerk of the circuit court.

Accordingly, question 1 is answered in the negative.

**AS TO QUESTION 2:**

Sections 62.23-62.26, F. S., provide the means by which circuit courts may remove the disabilities of nonage of all minors, male or female, over the age of 18 years residing in this state. Said section provides that upon the removal of a minor's nonage disabilities, he could "do and perform any and all acts, matters and things that he could do if he were twenty-one years of age."

*State ex rel Lamson v. Baker*, 25 Fla. 598, 6 So. 445 held that a minor whose disabilities were removed should, if otherwise qualified, be admitted to the practice of law. In *State ex rel Curington v. Swope*, 160 Fla. 277, 34 So. 2d 429 the court followed the *Lamson* case by holding that removal of disabilities of nonage entitled an applicant to be examined as to his qualifications to become a real estate salesman.

My immediate predecessor in office, in opinion 043-100, dated April 15, 1943 (A. G. O. 1943-1944, p. 173) held that a minor whose disabilities had been removed was qualified to hold the office of notary public. A. G. O. 060-122, issued July 27, 1960, held that a minor whose nonage disabilities had been removed by the circuit

court was eligible for a general lines insurance agent's license. In A. G. O. 055-176, issued Aug. 1, 1955, I held that a minor whose nonage disability had been removed was eligible to be appointed a deputy clerk of the circuit court.

However, the nature of the duties of a deputy sheriff requires a person of mature responsibility. Oftentimes a deputy will be called upon to exert his discretionary authority under emergency situations. His duties will frequently require him to bear arms, quiet disturbances, and exert the authority of the office under violent situations. Normally it would be expected that a person who has reached the age of 21 would be a more mature, experienced individual. Therefore, it is the suggestion of this office that although there seems to be no legal prohibition to the appointment of a minor who has had his nonage disability removed by decree of court, such appointments, as a matter of policy, should be made with extreme caution.

As qualified by the forgoing discussion, I am of the opinion that question 2 should be answered in the affirmative.

060-142—August 22, 1960

### COUNTY BONDS

SECURITY FOR DEPOSITED COUNTY REVENUE CERTIFICATE FUNDS—COUNTY DEPOSITORYES—CH. 136; §§130.11, 136.01-136.03, 659.21 AND 659.24(2), F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTION:

**Should the funds in the depository of the trustee of county revenue certificates be secured: (a) when such trustee is a bank, and is the depository of such funds; (b) when the trustee and the depository are not identical?**

Your inquiry invites attention to §§130.11 and 659.24, F. S., and to Ch. 136, F. S. Examination of those sections and chapter leads but to the conclusion that the legislature has used the word "bonds" therein in the generic sense, intending to include all types of county certificates of indebtedness (§136.01, F. S.), as distinguished from using such term in the more strictly defined sense found in cases dealing with the requirement for bond elections under §6, Art. IX, State Const. Thus the comments herein are applicable to all county certificates of indebtedness in the absence of statutes to the contrary.

Section 659.24(2), F. S., enacted by the legislature of 1953, provides an exception to the amount of collateral security for deposits of public money by giving recognition of the extent to which such deposits are insured under the provisions of federal deposit insurance, as amended, or any amendments thereto. Section 659.21, F. S., also enacted in 1953, gives similar recognition and provides a similar exception to the extent that such deposits are insured under the provisions of §12-b of the Federal reserve act, as amended, or any amendments thereto.

Section 130.11, F. S., requires county bond trustees, either banking institutions or individuals, to provide a bond running to the chairman of the board of county commissioners and his successors in office, for the faithful performance of the trustee's duty under the trust agreement and paying over and proper

accounting for all sums of money as may come into the trustee's hands by virtue of the trust.

Said section also contemplates that adequate and sufficient security, not only for the performance of the trustee's duties, but of the funds, be provided the county commissioners. The section does, however, permit the county commissioners, by resolution, to waive the requirement of such bond of a trust company appointed trustee of county bonds and to take in lieu thereof, "... a bond in the usual form, conditioned upon the proper accounting for all monies deposited in said trust company and the monies received by said trust company as trustee of county bonds shall be held by it as money deposited in any other county depository and the bond required of it as such depository shall secure the proper accounting for said monies, . . . ." Such bond is to be approved by the board of county commissioners as to form, amount and sufficiency of sureties. The legislative history of §130.11, F. S., indicates its last amendment was by §7, Ch. 22858, 1945.

Chapter 136, F. S., and particularly §136.02 thereof, the county depository law, requires that any bank desiring to be a depository for county funds deposit with or to the credit of the state comptroller securities of certain kinds, approved by the comptroller and in the amount to be determined by the comptroller, conditioned to insure the safekeeping, proper accounting for and payment to the proper authority of all money that may come into the bank's possession as such depository.

Section 136.03, F. S., requires that all persons having, receiving or collecting any money payable to the county funds, not otherwise provided for, shall pay the same to banks qualified to receive such moneys.

In view of the above statutes, it is my opinion that where the trustee is a bank or trust company, the security for the trust funds is that required by Ch. 136, F. S.; viz., the amount determined by the comptroller and that such security should be included in the clerk's monthly report to the comptroller and that no faithful performance bond as such, is required from the bank or trust company.

Where the trustee is an individual or individuals, §130.11, F. S., requires that the county receive a trustee's faithful performance bond as well as security for the trust funds. It does appear, however, that if the trust funds are deposited as such in qualified county depositories, then the security provisions of Ch. 136 would be applicable and the county could waive the requirement that the individual trustees post a security bond with the county.

It would appear to me that the better procedure to be followed is to require, in the resolution appointing county bond trustees, that such funds be deposited in qualified county depositories. Thus the obvious intent of the legislature that deposits of public moneys be adequately secured would be complied with.

Your question is answered accordingly.



060-143—August 23, 1960

### CRIMES

#### VIOLATION OF STATE LOTTERY LAWS—GROCERY STORE PROFIT-SHARING BONUS SCHEME

To: *Earl D. Farr, City Attorney, Punta Gorda*

#### STATEMENT OF FACT:

A certain grocery chain is conducting a "profit sharing bonus" scheme wherein participants are awarded from \$1 to \$1,000. The promoters furnish by mail to prospective customers a set of rules and answers to 20 questions relative to U. S. history and a bonus card. The bonus card is designed somewhat like a common meal ticket and contains numerals ranging from \$.10 to \$.2. Upon the purchase of groceries from a participating store, a number of numerals on the bonus card equivalent to the cost of the groceries are punched from the card. If no purchase is made the card holder is entitled to have one numeral punched from his card. When all numerals have been punched from the card, it is presented to the cashier and a small seal is broken from the card. Underneath the seal appears an amount of money and a question relating to American history. If the customer answers the question correctly he is awarded a cash bonus in the amount registered beneath the seal. It further appears from the information furnished by you that there is no prohibition against the participant's making reference to the list of answers previously furnished him before attempting to answer the question which appears beneath the seal on his bonus card.

#### QUESTION:

**Does the above scheme constitute a violation of the lottery laws of Florida?**

There are three material elements necessary to constitute a lottery, viz: (1) a prize, (2) an award by chance, and (3) a consideration. The elements of consideration and prize are so readily apparent in the above described scheme that they merit no further comment. While the element of an award by chance is somewhat more elusive in the scheme as outlined, I believe that it can be made equally apparent when the scheme is analyzed closely. The fact that the answers to the questions are furnished beforehand to prospective participants, and the further fact that a participant is allowed to consult such answers prior to making reply to the question propounded, makes the entire "question and answer" portion of the scheme a mere subterfuge. Thus, the scheme reduces itself, in effect, to the proposition that a certain grocery chain extends to all its customers an opportunity to win a cash prize upon the customer's buying a given amount of groceries. The fact that the amount of the cash prize is concealed underneath the tab of the bonus card is no different than if the participating customer were given an opportunity to reach into a box or bucket and pull therefrom a slip of paper which contained the amount of the prize to which he would be entitled. The fact that the normal amount of money

awarded to participants is relatively small does not change the unlawful character of the scheme.

Therefore, since I fail to recognize any appreciable element of skill involved in this scheme as outlined by you, your question, as set forth above, is answered in the affirmative.

060-145—August 30, 1960

#### AUTO TRANSPORTATION COMPANIES

MILEAGE TAX—EXEMPTION OF CERTAIN MOTOR VEHICLES—CH. 323, §§325.15(1), 323.29(1) AND 320.01(16) F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Is it necessary that certificated carriers report and pay mileage taxes on all miles traveled within the state, regardless of whether or not service performed is exempted from the jurisdiction of the state railroad and public utilities commission?

Chapter 323, F. S., enacted by Ch. 14764, 1931, as amended, to regulate the use of motor vehicles on the highways "undertakes to classify the users into three separate and distinct classes, each . . . placed under jurisdiction of the state railroad commission, for the purpose of appropriate regulation pursuant to statutory provisions . . ."

" . . . The three classes identified and defined in the statute are (1) auto transportation companies operating motor vehicles for the transportation of persons or property as common carriers for compensation; (2) auto transportation companies operating motor vehicles . . . as private contract carriers for compensation . . . where such carriage consists of *continuous* or *recurring* carriage under the same contract; (3) auto transportation companies operating ordinary 'for hire' motor vehicles on the public highways of this state in the transportation of persons or property for compensation." (Riley v. Lawson, Fla., 143 So. 619). (Emphasis supplied.)

Section 323.15(1), F. S., provides in part:

There shall be collected by the comptroller of the state from every auto transportation company as herein defined which has been granted a certificate of public convenience and necessity or a permit authorizing it to engage in the transportation of passengers or freight or both, and from every such auto transportation company to which no certificate or permit has been granted, but whose transportation operations are not exempt from the provisions of this chapter, a mileage tax . . . for every mile traveled for compensation by the motor vehicles of such auto transportation companies over the public highways of this state.

Section 323.29(1), F. S., provides in part:

. . . there shall be exempted from the provisions of this chapter, and from commission jurisdiction and control, . . . motor vehicles while engaged exclusively in transporting goods, wares, merchandise, horticultural, agricultural, . . . from the point of production to that point of primary manufacture, or from the point of production

to the point of assembling the same, or from either such point of production, primary manufacture or assembling to a shipping point of either a rail, water or motor transportation company, usually and generally serving the territory in which said production, manufacture or assembling takes place. . . .

There shall be further exempted from the *provisions of this chapter and from commission jurisdiction and control*, motor vehicles used exclusively in transporting agricultural or horticultural products, *supplies and materials*, including fertilizers and sprays, *and when delivered direct to the growers or consumers, or to an association of such growers or consumers.* (Note this paragraph added by 1937 amendment.) (Emphasis supplied.)

Fertilizer Carrier, Inc., through its application to the Florida railroad and public utilities commission, was issued, on March 1, 1957, certificate of public convenience and necessity to transport in common carriage certain fertilizers in specified territories, viz: (1) ammoniated sulphate (fertilizer) from Duval county to St. Lucie county; (2) ammoniated nitrate (fertilizer) from Santa Rosa county to points and places in Florida; (3) nitrate of soda (fertilizer) from Duval county to St. Lucie county.

In addition to the foregoing operations, covered by their certificate, said carrier also transports, for compensation, dolomite (fertilizer), ground limestone, rock, sand, etc. (for which no certificate has been issued) presumably to growers and consumers, and no doubt to other unknown consignees such as distributors for resale, road builders, etc.

The foregoing factual situation, together with the above-mentioned statutes, now poses the question that by virtue of its having been issued a certificate to transport certain items, is this carrier subject to payment of the mileage tax imposed under §323.15, F. S., *supra*, on *all miles traveled*, whether hauling materials exempt or otherwise?

The statute concerning the *licensing* of vehicles hauling for compensation provides in part:

In construing these statutes (title XXII) when applied to motor vehicles where the context permits the word, phrase or term. . . .

... "for hire" vehicles include all motor vehicles or trailers drawn by motor vehicles, when used for transporting persons, commodities or materials for compensation; . . . provided, however, the following shall not be deemed as operating "for hire", to-wit:

... motor vehicles used in the transportation of agricultural and horticultural products or in transporting agricultural or horticultural supplies direct to growers or consumers of such supplies, or to associations of said growers or consumers . . . (§320.01(16) F. S.).

In a recent Florida case a carrier sought a certificate to carry certain materials, including dolomite, sand, phosphatic sand, clay and crushed rock. After extensive hearing the commission declined jurisdiction of the carriage of these items on the theory that they were of the kind that had been excluded from the operation of the act (because the materials were either goods, wares and merchandise or materials, to which the adjectives "horticultural" and

"agricultural" applied as is set out in the first paragraph of §323.29(1), F. S., supra.)

On certiorari to the supreme court of Florida (Atlantic Coast Line R.R. Co. v. Boyd, 102 So. 2d 709) the court in granting the writ held that such materials were not "horticultural" nor "agricultural" goods, wares, merchandise or materials per se, such as fall within the exemption contemplated by the first paragraph of §323.29(1). The court did, however, say that dolomite, when the vehicles employed are used exclusively to take it directly to the consumer or grower (as provided by paragraph 3, §323.29(1), F. S.) is within the excluded jurisdiction of the commission. The court stated that "when a vehicle at any given time is employed in carrying dolomite on such trip the load must consist entirely of dolomite or dolomite and other exempt materials."

The court further stated "it is the vehicle itself which is affected (not the automobile transportation company), although its exempt character must be determined from the load it carries . . . (and) in construing the third paragraph of the section consideration must be given to the nature of the consignee." (Emphasis supplied.)

The court did not rule on the question of the exempt status of rock, ground limestone, sand, etc. from the standpoint of their being considered agricultural or horticultural supplies transported direct to growers or consumers, but rather it ruled on these items in light of their not being agricultural or horticultural wares, goods, merchandise or materials under the first paragraph of §323.29(1).

It is fundamental that the entire Ch. 323, F. S., and all provisions thereof should be construed together in order to arrive at the legislative intent, (See A. C. L. Railroad v. Mack, Fla., 57 So. 2d 447, text 450.)

In construing the entire statute (Ch. 323), it is obvious that the legislature intended that vehicles, when hauling "agricultural" or "horticultural" products, supplies and materials, direct to growers or consumers, or to an association of growers or consumers, be exempt from the mileage tax as well as without the jurisdiction and control of the commission. Thus, if any of the items transported by Fertilizer Carrier, Inc., *direct to growers or consumers*, (which term "consumers" includes, among others, commercial contract spreaders, etc.) might properly be classed as "agricultural" or "horticultural" supplies (as are normally used in growing, cultivating, etc.), mileage traveled in hauling a load made up exclusively of such exempt supplies would, it seems, be exempt from the mileage tax.

It is, however, my view that while the transportation of "agricultural" or "horticultural" supplies appears to be exempt as indicated hereinabove, in the event any given load consists of both exempt and nonexempt supplies, etc., or that such items otherwise exempt are delivered to others (such as distributors for resale etc.), than growers or consumers, or that part of a load, otherwise exempt, is transported to growers, etc., and the balance to a distributor, etc., a vehicle transporting same could not be considered as "used exclusively in transporting" insofar as concerns any given load or any given trip.

I find no authority whatsoever, either by statute or by cases, for holding that once a certificate is issued (whether issued in



error or otherwise) *all vehicles* of an auto transportation company, whether hauling exempt items or otherwise, are subject to the payment of the mileage tax on *all miles* traveled.

The above question is therefore answered in the negative.

060-146—August 29, 1960

#### SHERIFFS

SETTING AMOUNT AND COLLECTING BAIL BONDS UPON ARREST WITHOUT WARRANT—§§30.07, 30.23, 901.23, 903.19, 903.34(1), (2), 903.36, 321.05(4) (a) AND 627.0907, F. S.

To: *Harry O. Stratton, State Senator, Callahan*

#### QUESTIONS:

1. Is it legal for the sheriff or his deputy to levy, set or collect a bond from a defendant upon arrest without a warrant for a criminal offense?

2. Does the sheriff or his deputy have authority under the statute to set the amount of bail for any defendant charged with a criminal violation before a warrant is issued?

An unqualified negative or affirmative answer to your questions, as posed, would be difficult to render. However, I am inclined to the opinion that the meaning and import attached to the general subject matter of your inquiry merits an affirmative answer, qualified by the following observations of law and fact.

Section 901.23, F. S., requires that an officer who has arrested a person without a warrant shall, without unnecessary delay, take the person arrested before the nearest or most accessible magistrate in the county in which the arrest is made, having jurisdiction, and shall make before the magistrate a complaint, or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county. It is the sheriff's duty to comply with this statute instead of accepting an appearance bond.

I find no provision of law which authorizes a sheriff either to set the amount of bail or to accept a bail bond when he makes an arrest without a warrant.

Section 903.34(1), F. S., deals with what officers may admit to bail, but it does not authorize a sheriff to admit to bail. Nor do I find any other provision of law which authorizes a sheriff to admit to bail. When the sheriff accepts a bail bond from a person arrested by him without a warrant, without carrying such person before a magistrate, he admits that person to bail without being authorized by law to do so.

By virtue of §903.34(2), F. S., the sheriff is authorized to take and approve appearance bonds and §30.23, F. S., provides that he is entitled to a fee of \$2 for "writing, taking and approving bonds." Section 30.07, F. S., provides that duly constituted deputy sheriffs shall have the same power as the sheriffs appointing them.

Thus, it is readily apparent that a sheriff has no *statutory* authority to set the amount of any appearance bond in a criminal case, whether before or after warrant has been issued. However, the common practice indulged in by the various law enforcement

officials in this state in admitting a person to bail is done under color of judicial authority. By this it is meant that the county judges, or committing magistrates, frequently issue standing or continuing judicial orders, either orally or in writing, to the effect that bond in all cases of a particular class nature, such as reckless driving or other common petty violations, shall be in a given standard amount of money. As a practical matter such procedure is recognized as a judicial determination of the amount of bond to be assessed, and the action of the sheriff in accepting such amount is purely ministerial in nature. Should the sheriff abuse his authority in this behalf, §903.19, F. S., provides that the court, for good cause, may either increase or reduce the amount of bail or require new or additional bail.

The common practice of prudently admitting violators to bail, as above noted, operates as a convenience to the general public, as well as to law enforcement officials and committing magistrates. Certainly it would be impractical for a person who is arrested on Saturday night for a petty offense to be obliged to remain in custody of the arresting officer until Monday morning, or until such other time as a committing magistrate might be available to formally set the amount of bond in such individual case. Similarly, in cases where a motorist is arrested in some remote part of the county and charged with a minor traffic violation, it would be obviously impractical for all parties concerned if the officer had no choice but to escort the arrested party many miles away to the office of the nearest magistrate, and there, (in many instances) be obliged to remain until such time as the magistrate might be available to receive the officer's complaint and assess bond. Such strict compliance could conceivably result in a situation wherein our law enforcement officials would be spending most of their time in the magistrate's office, rather than on patrol. True, the offender has the statutory right to insist upon being taken before the magistrate for such purpose, but such right is rarely exercised except in cases of obvious or apparent abuse on the part of the arresting officer.

Nor can it be logically said that the above noted practice is contrary to the legislative intent that persons charged with minor offenses should not be unduly detained from exerting their right to bail. This is evidenced by the provisions of §821.05 (4) (a), F. S., which specifically authorizes highway patrolmen to accept a recognizance or cash bond directly from the person arrested, in lieu of delivering such person to the custody of the sheriff.

Also, as further evidence of similar legislative intent in the premises, §903.36, F. S., provides that guaranteed arrest bond certificates with respect to which a surety company has become surety, as provided by §627.0907, F. S., shall be acceptable in lieu of cash bail in an amount not to exceed \$200.

In summation, my response to your questions is, that while the sheriff has no statutory or other established legal authority to set the amount of bail in a criminal offense, the custom and usage practice indulged in by our various law enforcement officers in approving and accepting same when done under color of judicial authority as above noted, has never been condemned by an appellate court in this state. In my opinion this is a desirable prac-

tice, and though it is not entirely immune to abuse, it operates overwhelmingly as a practical implement to the expediency of justice.

060-147—August 31, 1960

### COURTS

#### POWER OF JUDGE TO APPOINT ACTING COURT REPORTER IN ABSENCE OF DULY APPOINTED OFFICIAL REPORTER AND DEPUTY UNDER CH. 57-641, SPECIAL ACT, PALM BEACH COUNTY

To: Joel T. Daves, III, County Solicitor, West Palm Beach

#### QUESTIONS:

1. Where the criminal court of record of Palm Beach county has a court reporter and a deputy court reporter under the authorization of a special act of the legislature, is it proper in case of the absence of the court reporter and the deputy court reporter for an acting court reporter to be sworn for a particular trial, provided, of course, that such acting court reporter is legally qualified as a notary public and by experience to report in shorthand the proceedings of the trial?

2. If the answer to question 1 is in the affirmative, would it matter if the absent court reporter or the deputy court reporter were actually within the city at the time of the trial in question, but engaged in other business?

#### AS TO QUESTION 1:

Your letter of Aug. 19, 1960, advises that Ch. 57-641 is the law concerning court reporters under which the criminal court of record of Palm Beach county operates. Said law created the positions of official court reporter and official deputy court reporter of said court. It provides for their appointment and tenure, prescribes their qualifications, duties, and compensation, and requires them to take an oath of office.

Section 4 of said chapter provides that the county solicitor shall appoint said court reporter and deputy court reporter with the approval of either one of the judges of said court, and requires that their qualifications be not less than those prescribed for official court reporters of the circuit courts; it also requires that they take an oath of office, and provides that they shall hold office at the pleasure of the county solicitor.

Section 2 of said chapter, which prescribes the duties of said court reporter and deputy court reporter, reads as follows:

Section 2. The said Reporter and Deputy Reporter are required to report all felony cases tried in the said Criminal Court of Record of Palm Beach County, Florida, and at the direction of the Judge thereof, or at the request of the County Solicitor they shall report any misdemeanor case in such Criminal Court of Record.

The effect of said §2 is to require that all felony cases tried in said criminal court of record be reported, and that any misdemeanor case shall be reported at the direction of the judge or the request of the county solicitor. By enacting said section the legislature manifested an intent that a reporter be on hand

for every trial so that he may report felony cases as a matter of course and so that he may report misdemeanor cases if so directed by the judge or requested by the county solicitor. In other words, a court reporter is an attendant who performs services which are an essential part of the proper functioning of said court.

Therefore, I think that if both the official reporter and the official deputy reporter should be absent when a case is to be tried, whether justifiably or unjustifiably, the court has the inherent power to appoint and swear in an acting court reporter for a particular trial. Otherwise, the plain intent and purpose of the above-quoted §2 would be thwarted.

In *King v. State*, 31 So. 254, the supreme court dealt with the power of a circuit court to appoint an acting state attorney in the place of the regular state attorney, who was sick and absent from court. The supreme court first pointed out that a statute authorized such an appointment and then went on to say:

... It is, besides, well settled that, even in the absence of such a statute, trial courts, having criminal jurisdiction, have an *inherent power*, in the exercise of such jurisdiction, to appoint some one to represent the interests of the state temporarily during the absence or inability to act of the regularly chosen officer whose official duty it is to so represent the state's interests. . . . (Emphasis supplied.)

In *Blich v. Buchanan*, 131 So. 151, the supreme court, after stating the rule to be that, in view of §27, Art. III, State Const., governmental functions requiring independent judgment, discretion, and authority can in general legally be exercised only by officers who are elected by the people or appointed by the governor, unless otherwise provided or permitted by the constitution, went on to say:

... There are exceptions to the above general rule, as, for example, the statutory and *inherent power* of a competent court to appoint suitable persons to perform functions in the court or to execute its orders and mandates, when no officer is available for that purpose, to the end that the court may not be hindered or rendered impotent in the complete exercise of its judicial functions. See *King v. State*, 43 Fla. 211, 31 So. 254. . . . (Emphasis supplied.)

Also, the criminal court of record of Palm Beach county, being a court of record, comes within the following quotation from 21 C. J. S. 219, Courts, §142c:

Apart from statute, a court of general jurisdiction, of record, or of last resort, possesses the *inherent power* to provide the necessary attendants and assistants as a means of conducting its business with reasonable despatch, or to provide for assistants charged with the care of its rooms or other like functions, and the court itself may determine the necessity. . . . (Emphasis supplied.)

Also, 14 Am. Jur. 262, Courts, §22, says that the power to appoint necessary attendants for the court is inherent in the court in order to enable it to perform properly the duties delegated to it by the constitution, and that it cannot be doubted that judicial power includes the authority to select the persons whose services may be required in judicial proceedings.



Therefore, question 1 is answered in the affirmative, subject to the following comments:

Since §4 of said Ch. 57-641 requires that the reporter and deputy reporter have qualifications not less than those prescribed for official court reporters of the circuit courts, and since §29.01, F. S., requires that an official court reporter for a circuit court shall be "an efficient reporter, experienced in reporting judicial proceedings," I think that any acting court reporter appointed by your criminal court of record should also be an efficient court reporter, experienced in reporting judicial proceedings.

However, it is not necessary that an acting court reporter who is appointed by the court be a notary public. He needs no qualifications in excess of those required of the official court reporter and official deputy court reporter, neither of whom need be more than "an efficient reporter, experienced in reporting judicial proceedings."

Your letter of Aug. 19, 1960, advises that sometimes both of the judges of said court are engaged in trying cases at the same time. When this is the case, the foregoing remarks will apply to either judge if both the official reporter and the official deputy reporter are absent from the court being conducted by him.

#### AS TO QUESTION 2:

I do not think that the power of the criminal court of record to appoint an acting court reporter depends upon what reason exists for the absence of the reporter and deputy reporter, it being my opinion that the power to make such an appointment exists if the reporter and deputy reporter are both absent for any reason when cases are being tried by said court. Therefore, question 2 is answered in the negative.

However, as I construe the above-quoted §2, it contemplates that the reporter shall either be present and report all felony cases and, if directed by the judge or requested by the county solicitor, report any misdemeanor case, or that the deputy reporter be present and perform those duties when directed to do so by the reporter. The duty to be present in court transcends the call of other business and that duty should not be subordinate to other business. I do not anticipate that either the reporter or the deputy reporter would ignore these principles, but if he should do so, I think that the court would, of course, have ample power to enable it to effectively deal with him.

060-148—September 1, 1960

#### REGULATION OF PROFESSIONS AND VOCATIONS REAL ESTATE LICENSE LAW—AUTHORITY TO SELL REAL PROPERTY IN OR OUTSIDE OF FLORIDA UNDER CH. 475, F. S., §§475.42(1)(e) AND 475.42(2), F. S.

To: *John C. Wynn, Chief Assistant State Attorney, 11th Judicial  
Circuit, Miami*

#### QUESTION:

Is it a criminal violation of Ch. 475, F. S., for a resident of Florida owning lands located outside the state of Florida, to (1) advertise said lands for sale in another state or country to residents of such state or country, or (2) offer said land for sale in another state or foreign

country to residents of such state or foreign country, or (3) sell said land in another state or foreign country to residents of such state or foreign country, without having first obtained a permit issued under the rules of the Florida real estate commission?

The two subsections of the Florida statutes which bear upon this question are §§475.42(1)(e) and 475.42(2). Section 475.42(1)(e) reads as follows:

No person shall *sell or offer for sale* any real property or interest therein, as defined in this chapter, where the real property involved or affected, is located outside of the state, except isolated, disconnected and single transactions, without obtaining a permit issued under the rules of the commission. Nor shall any person represent or cause to be represented, orally or in writing, to any other person or to the public, that the commission, by any permit issued by it, approves or recommends any promoter, broker, or salesman connected with the sale, or any property or investment being or about to be offered. (Emphasis supplied.)

Section 475.42(2) reads as follows:

Any person who shall violate any of the provisions of this section shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not more than six months, or if a corporation, by a fine of not less than one hundred dollars nor more than one thousand dollars, except where a different punishment is prescribed by this chapter. Nothing in this chapter shall prohibit the prosecution of any person for an act or conduct prohibited by this section, under any other criminal statute of this state, provided, however, in such cases, the state may prosecute under this section or under such other statute, or may charge both offenses in one prosecution, but the sentence imposed shall not be a greater fine or longer sentence than that prescribed for the offense which carries the more severe penalties. A civil case, criminal case, or a denial, revocation, or suspension proceeding may arise out of the same alleged state of facts, and the pendency or result of one such case or proceeding shall not stay or control the result of either of the others.

This question involves a construction, primarily, of the first of these subsection, i.e., whether by doing any of the acts set forth in (1), (2) or (3) above, said person will have either *sold*, or *offered for sale*, within the state lands located outside the state.

There are no court decisions construing this particular subsection of the Florida statutes.

The obvious intent of the statute is to protect the public against fraud and it is similar in many respects to the laws regulating the sale of securities. Such being the case, the law should be liberally interpreted to effectuate its purpose (*McElfresh v. State*, 9 So. 2d 277).

Notwithstanding, the requirement of a liberal interpretation, the law cannot operate extra-territorially and if any violation,

particularly criminal violation, is to occur, *it must result from acts done within the state.*

Since it does not affirmatively appear from the factual situation set forth in the question that any act will be done or performed within the state, it would necessarily follow that no criminal violation of Ch. 475 would result.

If it were the fact, that any acts in connection with either (1), (2) or (3) above would be performed by persons within the boundaries of the state, the conclusion reached could be entirely different. See 87 A. L. R. 60, concerning the extra-territorial effect of "Blue Sky Laws." However, since the question as framed does not present such an issue, it is not necessary to resolve the same.

All three parts of your question must therefore be respectfully answered in the negative.

060-149—September 6, 1960

### INSURANCE

WORKMEN'S COMPENSATION ASSIGNED RISK POLICIES—  
AGENT'S COMMISSION—§§627.351, 624.0224, 624.0226  
AND 626.0114, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

#### QUESTIONS:

1. Is an insurer required to pay commission to an agent on workmen's compensation assigned risk business?

2. If question 1 is answered in the affirmative, will insurers have to pay commissions to producing agents on workmen's compensation assigned risk contracts currently in force?

Section 445 of Ch. 59-205, now appearing as §627.351, F. S., authorizes casualty insurers to create, subject to the approval of the insurance commissioner, assigned risk plans. Further provisions of said section require that as to automobile liability insurers in this state that the insurance commissioner adopt an assigned risk plan. Of extreme importance to your inquiry is the following language of said section: "Such plan or plans shall provide for the payment to the producing agent of not less than 15 per cent of the annual premium on private passenger automobile insurance." (Emphasis supplied.)

It is fundamental that the amount of insurance agents' commissions is a matter of contract between the company and its agents and that "The Legislature cannot require the reduction of the compensation of general insurance agents under existing contracts in view of the provision of the Federal Constitution forbidding the impairment of the obligation of contracts." (29 Am. Jur., Ins., §112).

Examination of Ch. 59-205, The Florida insurance code, and in particular §§69, 71 and 265(4) thereof, in discussing agents' commissions, use the terminology "usual commission."

The file submitted with your inquiry, including a copy of what I understand is the workmen's compensation assigned risk plan in this state, has been examined. The plan makes no mention of an agent's commission for producing this type of business. It is my understanding that it has been a custom of long standing, because of the particular nature of workmen's compensation insurance,

that by agreement, either expressed or understood, agents producing workmen's compensation assigned risk business do not receive a commission on such business.

In view of the above statutes, authorities and comments, question 1 is answered in the negative. Thus, question 2 need not be answered.

060-151—September 14, 1960

### CRIMINAL PROCEDURE

MISDEMEANORS—PROSECUTION WHEN PENALTY PROVISION INEFFECTUAL BECAUSE OF UNCONSTITUTIONAL PROVISION OF SPECIAL LAW—§775.04, F. S.

To: Mack N. Cleveland, Jr., County Attorney, Seminole County, Sanford

#### QUESTION:

In view of the fact that Ch. 57-1863 is a special act of the legislature, may an individual property owner be prosecuted under said chapter for refusing to comply with zoning regulations duly set up under the authorization thereof?

Chapter 57-1863, special acts of 1957, empowers the board of county commissioners of Seminole county to establish zoning regulations applicable within certain territory of said county, after receiving the recommendations of the zoning commission appointed by said board and after holding a public hearing.

Section 17 of said chapter reads as follows:

Section 17. Penalties.—Any person, firm, partnership or corporation violating any of the provisions of this act or *who shall fail to abide by and obey all orders and resolutions promulgated as herein provided for shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by fine not exceeding five hundred dollars or by imprisonment not to exceed sixty days, or by both such fine and imprisonment.* (Emphasis supplied.)

As I construe said Ch. 57-1863, said §17 makes it a misdemeanor to fail to abide by and obey the zoning regulations duly adopted by the board of county commissioners under the authorization of said chapter.

However, that part of said §17 which provides a fine of not exceeding \$500 or imprisonment not exceeding 60 days, or both, is void because it violates the clause of §20, Art. III, State Const., which forbids the legislature to pass special or local laws for the punishment of crime or misdemeanor (See *Snowden v. Brown*, 53 So. 548). Nevertheless, the fact that the penalty provisions of §17 are void does not stand in the way of prosecuting a person who fails to abide by and obey valid zoning regulations promulgated by the board of county commissioners, because, as was said by the supreme court of Florida in *Taulty v. Hobby*, 71 So. 2d 489:

The Legislature may by special or local law declare stated things to be unlawful and provide by valid general law a punishment for failure to abide thereby. *Stinson v. State*, 63 Fla. 42, 58 So. 722; *Fine v. Moran*, 74 Fla. 417, 77 So. 533; *Zackary v. Morris*, 78 Fla. 316, 82 So. 830; *Jones v. State*, 93 Fla. 603, 112 So. 556; *Beasley v. Cahoon*, 109 Fla. 106, 147 So. 288.



and because there is a valid general law which provides the punishment.

Said §17 makes a violation thereof a misdemeanor and therefore makes such a violation unlawful within the meaning of the above quotation from *Taulty v. Hobby*. Therefore, we must look to the general law for the penalties which may be imposed. Section 775.07, F. S., which is a general law, provides the penalties to be imposed for crimes other than felonies where the penalty provided by statute is ineffectual because of constitutional provisions. It furnishes the penalties for violations of said §17 because such violations, being misdemeanors, are not felonies, and because the penalties provided by said §17 are ineffectual because of the above-mentioned constitutional provision (See *Stinson v. State*, 58 So. 722).

So, the fact that Ch. 57-1863 is a special act does not stand in the way of a prosecution under §17 thereof for failing to abide by and obey zoning regulations lawfully established by the board of county commissioners under the authority of said chapter, but the applicable penalties are those prescribed by §775.07, F. S.

Therefore, your question is answered in the affirmative.

060-152—September 14, 1960

#### CRIMINAL PROCEDURE

#### CONSTRUCTION OF §922.051, F. S.—SENTENCES OF IMPRISONMENT IN COUNTY JAIL—STATE PENITENTIARY—DISCRETION OF COURT

To: Warren H. Edwards, County Solicitor, Orange County, Orlando

#### QUESTION:

Do the provisions of §922.051, F. S., as interpreted in opinion 060-124, dated July 29, 1960, prohibit a sentence of imprisonment in the county jail in lieu of the state penitentiary where the legal sentence for the crime is in the alternative, i.e., up to a maximum of five years in the state penitentiary or up to a twelve month period in the county jail?

Section 922.051, F. S., reads as follows:

922.051 *Imprisonment in county jail; term of five years or less.*—Whenever punishment by imprisonment is prescribed, and said imprisonment is by statute expressly directed to be in a state prison, the court may, in its discretion in all cases where the sentence imposed is for a term of 5 years or less, direct that the imprisonment be in a county jail.

Said statute does not prohibit anything. It is a permissive enactment and it applies only where "imprisonment is by statute expressly directed to be in a state prison." It does not apply where a penal statute authorizes imprisonment in *either* the state prison *or* in the county jail, because such a penal statute does not "expressly direct" that the imprisonment be in the state prison; rather, it leaves it to the discretion of the trial court as to whether the imprisonment is to be in the state prison or in the county jail.

To illustrate: Said statute applies to a crime against nature if the trial court elects to impose a sentence for a term of five years or less, because the statute creating the offense, §800.01,

F. S., expressly directs that the imprisonment shall be in the state prison for not over 20 years. On the other hand, said statute does not apply to grand larceny because §811.021, F. S., the statute which provides the penalties for said offense, does not expressly direct that the imprisonment be in the state prison; rather, it authorizes imprisonment in the state penitentiary not exceeding five years or in the county jail not exceeding 12 months. Since §922.051 does not apply to a prosecution for grand larceny, the maximum county jail sentence which may be imposed for that offense is 12 months.

Since §922.051 has no bearing on a case in which the applicable penal statute authorizes imprisonment in *either* the state prison *or* the county jail, it follows that said §922.051 does not prohibit imprisonment in the county jail in accordance with the terms of the applicable penal statute, and therefore your question is answered in the negative.

My opinion 060-124, dated July 29, 1960, in which I held that §922.051 has no application to indeterminate sentences, in no way conflicts with this opinion. Instead, some of the statements made in that opinion affirmatively support the views expressed hereinabove.

060-153—September 15, 1960

#### TAXATION

#### EXEMPTIONS, PHYSICALLY HANDICAPPED PERSONS — BOILER INSPECTION FEES — CONSTRUCTION OF §205.15, F. S.

To: *Harry E. Simmons, Executive Director, Florida Council for the Blind, Tampa*

#### QUESTION:

**Does the Florida law exempting a person physically handicapped by blindness from the payment of certain occupational license taxes also apply to a city boiler inspection fee?**

The answer to this question lies in the construction placed on §205.15, F. S.

Section 205.15, F. S., provides, in part, that persons physically handicapped by blindness "shall be allowed to engage in any business or occupation in counties in which they live without being required to pay for a license."

Where the matter, property or person sought to be taxed is within the tax statute, and the issue is whether or not exemption from the tax is applicable, the exemption provision is to be construed largely in favor of the taxing authority and strictly against exemption from tax liability (82 C. J. S., §396(d) F. S. n. 65).

This question has been considered by this office in other opinions. We refer you to A.G.O. 056-341, of Dec. 10, 1956, concerning Ch. 205, F. S., the statute in question here. This opinion stated, in part, and we quote:

We are here dealing with *occupational license taxes*. "The term 'License taxes' has a well-settled connotation in legal terminology and has reference to a charge imposed for the privilege of engaging in a business or profession." *City of St. Petersburg v. Florida Coastal Theatres, Fla.*, 42 So. 2d 525. A tax imposed solely or primarily for the

purpose of raising revenue and merely granting the person taxed the right to conduct a business or profession, is not an "excise tax" but a "general tax"; further, a tax imposed for nothing more than the cost of issuing a license and inspecting and regulating a business is an "excise tax." Only where a business involves public health, comfort, safety, morals or welfare properly may a municipality impose an excise tax with respect thereto. *American Can Co. v. City of Tampa, Fla.*, 14 So. 2d 203.

An exemption of a class of persons from an occupational license tax will not also exempt them from a license tax used to pay expenses of testing their qualifications and to enforce regulations intended to protect the health of the public (*Girard v. Smith*, 52 S. W. 2d 347).

It is the opinion of the attorney general that the charge imposed by the city of Tampa as a boiler inspection fee is an excise tax imposed as a regulatory measure for the protection of the public from an inherently dangerous piece of equipment and does not come under the provision of §205.15, F. S.

The question is therefore answered in the negative.

060-154—September 15, 1960

#### LIQUOR LICENSES

#### NUMBER TO BE ISSUED AS AFFECTED BY REGULAR FEDERAL CENSUS — STATUTES DEPENDENT —

§§561.20, 561.34, 11.031(3), (4), F. S.

To: *L. Grant Peebles, Director, State Beverage Department, Tallahassee*

#### QUESTION:

What is the effective date of any change in the number of beverage licenses in a municipality, or in a county outside of its municipalities, due to a population change as shown by a regular federal census?

Section 561.20, F. S., provides that beverage licenses issued under §561.34, F. S., "shall not be issued so that the number of such licenses within the limits of any incorporated municipality, or in the territory of any county lying outside of such municipalities therein, shall exceed one such license to each twenty-five hundred residents, or fraction thereof, within such municipality or within such county outside of the limits of such municipality *as shown by the last regular state-wide census*, either federal or state, of such county or municipality." The date of the increase of such licenses because of an increased population according to a regular federal or state state-wide census is not fixed by the said section of the statutes, or by any other statute expressly fixing such effective date. We are, therefore, confronted with the question of the date of increase of beverage licenses when additional licenses are allowed because of increased population.

Section 11.031, F. S., by subsection (3) thereof, provides that "the last federal decennial state-wide census shall not be effective for the purpose of affecting acts of the legislature *which apply only to counties of the state within a stated population bracket* until July 1 of the year following the taking of the census." This subsection was derived from Ch. 59-28, which, from its title was

designed to "apply only to counties *within a stated population bracket*." Chapter 59-264 appears to have been designed to apply to "existing population acts applying to particular counties." Section 11.031(4) provides that "from and after the time the 1960 federal decennial census is officially announced the population brackets of existing *population acts*, applying said acts to particular counties, are amended so that said acts shall thereafter relate to the same counties. . . ." Then follows machinery for making effective the amendment so made by said subsection (4). Subsection (4) is derived from Ch. 59-264, which chapter relates to the same group of "population acts" as are embraced in subsection (3) above.

By reference to Vol. 27 F. S. A., on pp. 305-350, inclusive, and the cumulative annual pocket parts to said volume, we find hundreds of acts of the Florida legislature made applicable to particular counties by the use of population brackets, such brackets varying in difference between the minimum and maximum populations of only a few to several thousand, yet at all times so designed as to limit the number of counties to which applicable. This type of population act differs materially from those considered by the courts of this state in *State v. Daniel*, 87 Fla. 270, 99 So. 804; *Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809, and other like cases. The classification by population made by said §561.20, F. S., is of the same nature as that considered by the court in the last above mentioned cases. As a rule of thumb, although doubtless subject to some exceptions, acts of the legislature limited by their terms to counties having not less than a stated population and not more than another stated population, so that only a limited number of counties or municipalities come within its purview and others may not reasonably be expected to come within its purview under subsequent census, would seem to be within the purview of §11.031(3) and (4), F. S., and not within the rule of *State v. Daniel*, *supra*, and *Sparkman v. County Budget Commission*, *supra*.

This office by its opinion of Sept. 24, 1940 (1939-1940 AGO 531) held the effective date of a federal census was the date as of which taken, but in its opinion of June 18, 1945 (1944-1945 AGO 104) held that a state census was effective as of the date of its official publication, promulgation or announcement. In its opinion of Aug. 9, 1960 (060-132) it was held that for some purposes a census might be effective upon a preliminary publication of the census. An examination of the annotation in 43 A. L. R. 2d 1353-1373, upon the question of the effective date of a census, reveals numerous court holdings, the majority rule (1) being that a census is effective upon its official publication, promulgation or announcement; the minority rules appear to be in the following order, (2) being effective upon preliminary publication, which should be an apparent final figure, (3) as of the date the enumeration was taken, and other minority rules. We find no published Florida court decisions on the question. The nature of the statute in question seems to have been considered in some cases. In some cases the population may be material, while in others the population may be merely an incidental element; in such cases it may not be material that the census figure used be a final figure.

Should a preliminary census figure, instead of the final and permanent figure, be used in determining the number of licenses to be issued under §561.20, and the total number of licenses seem-



ingly permitted thereunder be in excess of the number the municipality or county is entitled to, so as to require the cancellation thereof, hardships, as well as other difficulties, might occur; all of which points to the use of the final official publication, promulgation or announcement of the census, instead of a preliminary one. These observations point to a legislative intent to apply only the final official publication, promulgation or announcement of the federal regular census and not a preliminary publication. Under §143, title 13, of the U. S. code, the tabulation of the total population by states "shall be completed within eight months from the beginning of the enumeration and reported by the Secretary (of Commerce) to the President of the United States," who, under §2a, title 2, of the U. S. code, must, on the first day, or within one week thereafter, of the first session of each fifth congress, beginning with the 85th congress, transmit to congress the said information.

From the above and foregoing, we hold that the effective date of the current regular federal census (1960), for the purpose of §561.20, F. S., is the date of the official publication, promulgation or announcement, as contemplated by §143, title 13, of the U. S. code. We further hold that §11.031(3) and (4), F. S., have no application to said §561.20, the same not being an act applying "only to counties of the state within a stated population bracket," within the intent and purview of said §11.031(3), F. S.

060-155—September 15, 1960

#### OUTDOOR ADVERTISING

LICENSE REQUIREMENTS — CH. 479, §§479.01(2), (4), 479.04, 479.07(1), 479.16, F. S.

To: Millard Davidson, Director, Properties and Advertising Division, State Road Department, Tallahassee

#### QUESTION:

Does the following described activity on the part of a sign-painting company, designated as firm "B" constitute a violation of Ch. 479, F. S., laws regulating outdoor advertising?

#### STATEMENT OF FACT:

Firm "A" conducts an extensive land development operation in Florida, including the building and/or promotion of housing subdivisions. The various projects promoted by firm "A" are advertised on billboards erected on leased premises of various land owners along the highways. Firm "B" procures the leaseholds for some of these billboards, pays for same, erects the billboard structures, and paints the desired advertising on the face of same. At the lower center portion of each finished billboard appears in bold print the words: "Firm 'B' Signs." Firm "B" is not a regular employee or subsidiary of firm "A" but does receive reasonable compensation for the noted services performed. Firm "B" has not procured a license as required by §479.04, F. S.

As applies to the given situation, the pertinent part of §479.04, supra, provides as follows:

No person shall engage . . . in the business of advertising (beyond municipal boundaries) without first obtaining a

license . . . and no person shall *construct, erect . . . lease or sell any . . . outdoor advertising structure . . . or outdoor advertisement of any kind . . . without first obtaining a license . . .* (emphasis supplied).

Therefore, if firm "B" actually erects the advertising structures for the use and benefit of firm "A" and receives compensation for same, there is no doubt that such activity should be licensed.

(2) "Advertising structure" means any structure erected for advertising purposes, with or without any advertisement displayed thereon, situated upon or attached to real property outdoors, upon which any poster, bill, printing, painting, device or other advertisement of any kind whatsoever may be placed, posted, painted, tacked, nailed or otherwise fastened, affixed or displayed.

(4) "Business of outdoor advertising" means the business of constructing, erecting, operating, using, maintaining, leasing or selling outdoor advertising structures, or outdoor advertising signs or outdoor advertisements. (§479.01, F. S.)

I am not unmindful of the various exceptions enumerated in §§479.07(1) and 479.16, F. S. However, a close study of these sections leaves me with the conclusion that they pertain primarily to "permits" as opposed to licenses. These exemptions exempt the necessity for a license only in those instances when the structure or other form of advertisement is *erected* by the person or persons directly benefited by such advertisement, provided same is not constructed by someone in the *advertising business*.

In this behalf, your attention is directed to §479.01(4), which defines the "business of outdoor advertising" as ". . . the *business of constructing, erecting . . . outdoor advertising structures . . . or outdoor advertisements. . .*" (Emphasis supplied.)

Volume 5, Words and Phrases, at p. 977, gives several definitions to the word "business," but it appears that in its most commonly accepted legal sense, the word "business" is a word of "large signification, denoting employment or occupation in which a person is engaged to *procure a living . . . or for profit . . .*" as opposed to odd jobs or isolated endeavors.

The painting of a sign for another, without more, may not constitute a person or a firm as being engaged in the outdoor advertising business, but where there are additional elements involved of designing, erecting or maintaining structures and signs including the leasing of sites for same, it seems quite clear the person or firm is engaged in the outdoor advertising business.

In the event that firm "B" should limit its activities to only painting the advertisements, message design or slogan on the sign structure, then the question as to whether or not such activities constitute the business of outdoor advertising would depend upon the factual circumstances involved. In my opinion the following elements would be necessary to the operation within the activities licensed under our outdoor advertiser's law:

1. The painting or design must have been *posted, painted or otherwise displayed on an outdoor structure by a person or firm who is engaged in the business of outdoor advertising;*

2. The advertisement, message design or slogan so applied to the outside advertising structure must be of such nature that it would "invite or draw the attention of the public to any goods,

merchandise, property, etc., manufactured, produced, bought, sold, conducted, furnished or dealt in *by any person . . .*"

That the activities of firm "B" in the premises are *prima facie* the operation of an outdoor advertising "business" is further demonstrated and emphasized by the trade name "Firm 'B' Signs," which appears in bold letters on each structure.

It is therefore my opinion that the activities of firm "B" in either instance above outlined come within the unexcepted purview of the "business of outdoor advertising," as contemplated by Ch. 479, F. S., and, as such, are subject to the license requirements of said chapter.

060-156—September 16, 1960

#### TAXATION

MUNICIPAL OCCUPATIONAL LICENSE TAXES, NONRESIDENTS OF MUNICIPALITY — APPLICATION TO REAL ESTATE BROKERS AND SALESMEN — CH. 475;

§§475.22-475.24, F. S.

To: *Allen Clements, Jr., Attorney, Town of West Miami, Miami Beach*

#### QUESTION:

Are real estate brokers and salesmen, duly licensed under and pursuant to Ch. 475, F. S., who take listings of real property located in a municipal corporation, other than where they reside or have their place of business, and follow up said listings, required to obtain an occupational license from the municipality wherein such real estate is located?

The particular municipality in question is the town of West Miami, in Dade county, whose municipal ordinances, as you advise, require a municipal occupational license and license tax of real estate brokers and salesmen who "engage in or manage any business, profession or occupation," as such brokers or salesmen, within said town. An examination of §13, Ch. 26301, and §12, Ch. 27971, 1949 and 1951, the same being municipal charter acts for the said town of West Miami, reveals charter provisions authorizing the raising of municipal funds "by licenses on professions, businesses and occupations carried on within the corporation." These charter provisions, if they have remained in force seem to authorize the municipal ordinance requiring an occupational license and license tax of real estate brokers and salesmen engaged in or managing a real estate brokerage or agency business within the said town. These observations seem to pose the question of when is a real estate broker or salesman engaged in or carries on a real estate business within a municipality?

Sections 475.22, 475.23, 475.24, and other sections, of the Florida Statutes, contemplate that real estate brokers and salesmen have and maintain principal offices, and permit the maintenance of branch offices. When a broker changes his business address his certificate of registration expires and a new one must issue before he may maintain a business address elsewhere (§475.23, F. S.) Registration of real estate brokers and salesmen consists "of the placing and keeping of the name and business address, and if of a salesman, the name and business address of the employer also,

upon the list of brokers and salesmen in the office of the Florida Real Estate Commission. . . ."

It seems clear from the authorities that the taxing power of a municipal corporation is not a power that may be extraordinarily exerted, directly or indirectly, so that one municipality may not levy a tax on a business or occupation transacted or carried on in another municipality or otherwise beyond the taxing municipalities borders (*Duffin v. Tucker*, 113 Fla. 621, 153 So. 298, text 300 and 301; *Hamilton v. Collins*, 114 Fla. 276, 154 So. 201, text 202; *Farris v. Hall*, 115 Fla. 433, 156 So. 114, text 115; *Whiddon v. Vickers*, 127 Fla. 222, 172 So. 923, text 924; *Bozeman v. Brooksville, Fla.*, 82 So. 2d 729; 53 C. J. S. 484, §10.) However, "when a part of a business is conducted within the city limits, the part that is also carried on outside does not preclude the city from imposing a license tax on such part as is carried on within the limits. . . ." (53 C. J. S. 484, §10.) Doubtless real estate brokers and salesmen, when following their business or profession, are engaged in a business, profession or occupation within ordinary license and license tax statutes and ordinances (*Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, text 472; *Cohen v. State, Fla.*, 99 So. 2d 563, text 564; 53 C. J. S. 556, §27.) Real estate brokers and salesmen located in one municipality, selling or renting properties in another municipality in this state, would seem to be engaged in such business, profession or occupation. Whether or not such brokers and salesmen would be subject to license taxes by the municipality wherein the properties so sold or leased are located would doubtless depend upon attending facts and circumstances.

The case of *Duffin v. Tucker*, 113 Fla. 621, 153 So. 298, text 301, may throw some light on this question. In this case *Duffin* was an employee of a meat packing company taking orders for the company's meat products and making delivery of orders for meat products previously taken by him. Such orders were never filled, from the truck or otherwise, in the city of Cocoa, but were processed and rejected or filled in Jacksonville, the place of business of the company, and delivered by truck to the customer in Cocoa previously giving such order to the company employee. The court, reasoning by analogy to the law of interstate commerce, stated "we come to the conclusion that when a salesman takes an order in the City of Cocoa, which order is sent to the City of Jacksonville for approval and is there approved by the dealer and the order is then shipped to the City of Cocoa . . . and is there delivered to the purchaser, that such transaction cannot be divided into parts so as to make one or more parts of the transaction amenable to the ordinance of the City of Cocoa, while the other parts of the transaction occurred beyond the jurisdiction of the city and cannot be reached by an ordinance imposing a municipal tax in the City of Cocoa thereon. They must be all taken and regarded as constituting one transaction or shipment from a vendor in one municipality to a vendee in another municipality." The facts in *Farris v. Hall*, 115 Fla. 433, 156 So. 114, were substantially like the facts in *Duffin v. Tucker*, with Lake City attempting to impose a like tax on the meat company and its employee. The court applied the rule in *Duffin v. Tucker*, thereby confirming that rule. In *Bozeman v. Brooksville, Fla.*, 82 So. 729, a business concern of Bartow sent employees into Brooksville to solicit orders for goods manufactured



and offered for sale by said business concern; Bozeman, the said employee, took orders in Brooksville for such goods, which orders were sent to Bartow and there accepted, filled and delivered to customers in Brooksville. Bozeman was convicted in the city court of Brooksville for failure to obtain a municipal license and pay a license tax as a solicitor or canvasser as required by a municipal ordinance. It was held that the ordinance, as construed by the city of Brooksville, was extraterritorial in effect and the license fee provision was held invalid as to the transaction outlined.

Reference is here made to the definition of a real estate broker subject to the licensing requirements of Ch. 475, F. S., which includes persons who for compensation take part in the procuring of sellers, purchasers, lessors or lessees of real property, or interests therein, or directs or assists in the procuring of prospects, or the negotiation or closing of any transaction which does, or is calculated to result in a sale, exchange or leasing thereof. A real estate salesman is, in effect, an agent of the real estate broker by which employed. Doubtless in connection with the sale or lease of the properties within the town of West Miami, negotiations to a more or less extent take place within West Miami, although other negotiations, concerning such sales or leases, take place elsewhere. Doubtless some of these negotiations, like the taking of the orders, in *Daffin v. Tucker*, supra, *Farris v. Hall*, supra, and *Bozeman v. Brooksville*, supra, were merely incidental and did not of themselves constitute a doing of business, while others may be material and constitute a doing of business. The difference between what constitutes doing business and what does not is often a fine line difficult of determination. We doubt that a mere listing of real property located in West Miami, with a real estate broker for sale or lease, would of itself constitute a doing of business by the broker within said municipality; however, should the negotiations and the agreement to sell or lease be carried on within the limits of West Miami, such would doubtless constitute a doing business within said municipality. It is doubted that the mere exhibition of the properties, to prospective purchasers or lessees by the real estate broker or salesman, would of itself constitute the doing of a real estate brokerage or agency business within West Miami; but actual negotiations between the broker and the prospect including terms, length of time, and matters generally considered in making real estate sales or leases, might well constitute doing business.

Although not exactly in point the authorities of what constitutes a doing of business by a foreign corporation in a state other than that of its incorporation, so as to require their qualification as a foreign corporation, may be helpful (see 20 C. J. S. 45-62, §§1828-1842; 12 C. J. S. 793, notes 36, 37 and 38.) Upon the general question of what constitutes doing business see annotations in 40 A. L. R. 1451-1459; 45 C. L. R. 255-258; 59 A. L. R. 459; 25 A. L. R. 2d 1203-1205; 42 A. L. R. 2d 556-558; and 59 A. L. R. 2d 1131-1139.

From the above and foregoing, real estate brokers and salesmen, duly licensed under and pursuant to Ch. 475, F. S., who take listings of real property located in a municipal corporation, other than where they reside or have their place of business, and follow up said listings, are required to obtain an occupational license from the municipality wherein such real estate is located, only when a material part of the sales or lease transaction takes place within said municipality. Where the efforts of the real estate broker, or

his salesman, in the corporate limits of the municipality wherein the real property is located, *are incidental and not a material part of the transaction*, such broker or salesman is not doing business within said municipality within the purview of our licensing statutes, but where a material part of the transaction, he is so doing business.

Your question is answered accordingly.

060-157—September 19, 1960 .

#### TAXATION

CORPORATE STOCK OF GROWERS LOAN AND GUARANTY CO. — TAXABILITY UNDER CH. 199, F. S. — CHS. 618 AND 619, §§193.19, 199.01, 199.02, 199.05, 199.07, 608.42, 610.20, 612.18, 618.07, 618.22 AND 619.01-619.09, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Is the corporate stock of the Growers Loan and Guaranty Co., a Florida corporation, issued and outstanding in the hands of stockholders residing or having their principal offices in this state, subject to taxation under Ch. 199, F. S.?

The said Growers Loan and Guaranty Co. was incorporated under the statutes and laws of Florida providing for the incorporation of corporations for profit, letters patent having been issued Nov. 7, 1916 (§2647, et seq., G. S., 1906; see also §4049, et seq., R. G. S., 1920), with an authorized capital of \$50,000, divided into 1000 shares of common stock of \$50 per share. Numerous amendments to the said charter have, from time to time, been made, including amendments increasing and changing the capital stock authorized to be issued by the corporation. The last amendment, affecting the capital stock of the corporation, was filed on June 27, 1944 and recorded on July 10, 1944, increasing the authorized capital stock of the corporation to \$2,500,000, consisting of 20,000 shares of preferred stock, of \$50 per share, and 30,000 shares of common stock, of \$50 per share. Annual returns have been filed by the corporation, in conformity with §608.32, et seq., F. S., and prior statutes and laws, to and including the 1960 return.

It appears from the request for opinion herein, and the file handed us therewith, that 70%, or more, of the issued and outstanding corporate stock of the said corporation is now vested in the Florida citrus exchange, probably as much as 74% of said issued and outstanding stock being so vested, the remainder of the said issued and outstanding stock being vested in other persons, firms and corporations. Your request for opinion is primarily concerned with the stock standing in the name of the Florida Citrus Exchange.

Corporate stock issued by corporations organized and existing under the laws of this state is deemed personal property (§608.42, F. S.), and was so considered under prior statutes (see §§610.20 and 612.18, prior Florida Statutes; §4058, R. G. S., 1920; and §2655, G. S., 1906). Corporate stock is deemed intangible personal property for purposes of taxation under the statutes of this state (§§199.01 and 199.02, F. S.). The said Growers Loan and Guaranty Co., being a Florida corporation for profit, its said stock, in the hands

of residents of Florida, including corporations, having a tax situs in this state, is subject to taxation under and pursuant to said Ch. 199, F. S., unless within some statute or constitutional provision exempting property from taxation. Under §199.02(5), F. S., "intangible personal property belonging to the state, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." The same rule would be applicable to the U. S. and its agencies, departments, etc.

The Florida Citrus Exchange appears to have been incorporated under and pursuant to Ch. 5958, 1909 (see also §§4510-4516, R. G. S., 1920; §§619.01-619.09, F. S.), as a nonprofit cooperative association or corporation. We are advised that the Florida Citrus Exchange did, heretofore, under and pursuant to §618.22, F. S., adopt and come under the provisions of Ch. 618, F. S., in so far as said chapter does not conflict with the provisions of Ch. 619, F. S., under which the said citrus exchange existed. Under said Chs. 618 and 619, F. S., the said citrus exchange was authorized to "purchase or otherwise acquire, to hold, own and exercise all rights of ownership in, and to sell, transfer, pledge . . . shares of capital stock, bonds or other obligations of any corporation or association," as well as to buy, hold and exercise all privileges of ownership over personal property, (§618.07(5) and (7), F. S.), as well as to "purchase or otherwise acquire, hold, own, sell and otherwise dispose of any and every kind of real or personal property necessary to carry on its business" (§619.07(2), F. S.), as well as to "own or hold stock in any corporation organized under the laws of the state, if such corporation is organized, or conducts, or operates, its business, solely for the benefit or advancement of the interests of persons engaged in agricultural or horticultural pursuits in this state" (§619.08, F. S.).

The Florida Citrus Exchange, having been organized under what is now Ch. 619, F. S., holds title to its property in the nature of a trustee for the use and benefit of its members, and is, therefore, within the purview of our opinion 055-325, of Dec. 8, 1955 (1955-1956 AGO 420-425). The legal title to the corporate stock in question is vested in the Florida Citrus Exchange, however, the equitable or beneficial title is in the members of the said citrus exchange. Under §199.07, F. S., it is "made the duty of every person, firm or corporation of this state owning or having control, management, or custody of intangible personal property which is subject to taxation under the laws of Florida, including trustees, executors, administrators, receivers and all other fiduciaries, to file a sworn return of the same with the county assessor of taxes in the proper county . . .," and under §199.02(2), F. S., where "the trustee returns to the tax assessor such beneficial interest (interest of cestui que trust) and pays the tax thereon to the tax collector in Florida, then the owner of such beneficial interest shall not be required to return the same for taxation." The statement is made in 31 Fla. Jur. 449-450, §556, that "it is clearly the intent of the legislature that trustees controlling, managing or having custody of intangible personal property should pay the taxes thereon, since the statute mandatorily requires that such trustee should file a return of such property."

It is stated in 84 C. J. S. 215, §100, that "as a general rule such property (trust property) is assessed to the trustee as holder of

the legal title and not to the settlor or beneficiary, although on compliance with legal requirements the trustee may escape personal liability, and the tax is in substance on the interest of the beneficiary." It seems that "a tax levied on trust property is collectible only out of the trust assets, and not out of the property belonging to the trustee personally." (Frick Driscoll, CCA Pa., 129 F. 2d 148). Section 193.19, F. S., provides that "when a person is assessed as a trustee, guardian, executor, or administrator, a designation of his representative character shall be added to his name, and such assessment shall be entered upon a separate line from the individual assessment." "Ordinarily, since the trustee holds the legal title, the situs of intangible personal property held by a trustee, for the purpose of taxation, is at the domicile of the trustee, even though the cestui que trust is not a resident of the state in which the trustee is domiciled, especially where the trustee also holds the property involved at his domicile." (84 C. J. S. 238 and 239, §117; State v. Beardsley, 77 Fla. 803, 82 So. 795).

From the above and foregoing, the above question is answered in the affirmative; subject, however, to the limitation that where the corporate stock is held by a trustee in trust for another or others, the property of the trust, and not property held by the trustee personally, may be resorted to for the collection of the tax. Although the stock in question, being held by a corporation organized and existing under Ch. 619, F. S., may be held by the corporation as trustee, other properties of the said corporation are held in the same capacity. No member of the said citrus exchange holds title to any specific shares of the stock in question, but an interest, along with every other member, in all the corporate property, so that the corporate property generally may be resorted to when enforcing assessments made against the stock in the name of the citrus exchange as owner in the nature of a trustee. The revolving fund certificates, issued by the Plymouth Products Coop., to the Plymouth Citrus Growers Ass'n, and others, belonged to specific persons, firms or corporations, and were not general property of the said cooperative, which distinguishes said certificates from the shares of stock here involved (055-325, *supra*).

The shares of stock, being subject to taxation in the name of the Florida Citrus Exchange, at least their legal owner, should be assessed at their full cash value in accordance with §199.05, F. S.; their full cash value being a question of fact to be ascertained by the taxing officials.

060-158—September 19, 1960

#### TAXATION

#### TAX EXEMPTIONS — NONPROFIT ASSOCIATIONS AND CORPORATIONS — HOMES FOR THE AGED — §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

When are nonprofit associations and corporations entitled to tax exemption as to real and tangible personal property owned and used by them?

Section 1, Art. IX and §16, Art. XVI, State Const., makes provision for exempting from taxation of properties "held and



*used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes," (emphasis supplied) which sections have been construed as limitations on the power of the state legislature to provide for the exemption from taxation of any class or classes of property not mentioned in the said constitutional provisions (*L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; see also *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 239; *Sparkman v. State*, Fla., 58 So. 431, text 432; and Annotation in 61 A. L. R. 2d 1038-1041). The right to an exemption under said constitutional provisions, being limited as aforesaid, the legislature may not legally provide for the tax exemption of any other property (*L. Maxcy, Inc. v. Federal Land Bank*, supra; *State v. St. John*, supra.)

Tax exemptions allowed by said constitutional provisions, or by legislation duly adopted thereunder, are "determined by the *use and ownership of the property*, (emphasis supplied) and that is, only property that is held and used exclusively for religious, scientific, educational, literary or charitable purposes." (*University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79; *State v. St. John*, supra; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; *State v. Inter-American Authority, Fla.*, 84 So. 2d 9, text 16). It is the property and not the corporate entity which is exempt (*Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 238). Exemptions from taxation, whether provided by the constitution or by statute, are to be construed against the claimant and in favor of the taxing power (31 Fla. Jur. 29-31, §142).

"It appears to be well settled that one asserting that property is immune from a tax sought to be imposed thereon has the burden of establishing such immunity" (*Genesee Corp. v. Owens*, 155 Fla. 502, 20 So. 2d 654, text 656; *Armstrong v. Tampa, Fla. App.*, 112 So. 2d 293, text 298) and a "person who seeks to establish an exemption from taxation paid by others has the burden of establishing by clear evidence and law that he is entitled to such exemption" (*Armstrong v. Tampa*, supra; *Robinson v. Fix*, 113 Fla. 151, 151 So. 512, text same), at least unless the use of such property is a matter of such public knowledge as to constitute notice in the nature of judicial notice.

We have examined the copy of the charter of the Hunger-Ford Convalescent Hosp. Ass'n, a Florida nonprofit corporation, having its principal place of business in Duval county, the provisions of which are sufficient to permit the operation of an institution "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," within the purview of §1, Art. IX and §16, Art. XVI, State Const.; however, as stated in *Lummus v. Florida Adirondack School*, supra, it is the property and not the corporation entity that is entitled to tax exemption. To be exempt, the property claimed to be exempt must not only be held for one or more of the purposes mentioned in said sections and articles of the state constitution, but must also be used exclusively for one or more of said purposes.

In *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, it appears that the first floor of a medical center or hospital was rented and such rents "used exclusively to operate the hospital;" this showing was insufficient to prove a right to tax exemption under the above men-

tioned sections and articles of the Florida constitution. In *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, it was found that although the said club provided certain university scholarships, educational in nature, that such purpose was an incidental and not the main purpose, which was a social club; tax exemption was denied. In *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, it was found that a portion of property claimed to be entitled to tax exemption on account of being used for educational purposes was actually being used as living quarters by the operator or head master of the school; so the property was found not to be used exclusively for educational purposes, and the exemption was denied. In *Amos v. Jacksonville Realty and Mortgage Co.*, 77 Fla. 403, 81 So. 524, property of an educational institution was held not entitled to tax exemption when used partly for residence of the principal thereof; the use was not exclusive for a purpose mentioned in the above constitutional provisions. In *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865, the court remarked that "property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and used exclusively for that purpose or to such extent as §192.06, Florida Statutes, . . . defines."

The case of *Orange County v. Orlando Osteopathic Hosp., Inc.*, Fla., 66 So. 2d 285, merits consideration, its operation having been determined by the high court of this state to be within the purview of said constitutional provisions so as to entitle it to tax exemption. It was found that "no profits from the operation of the hospital are turned back to the members. Whenever any surplus income accrues, it is used to purchase additional facilities and equipment and the expansion of the hospital service. For an eight year period covering the years 1944 to 1951, inclusive, the corporation was able to retain only 3.32% of its net revenue, and during the same period an average of 34.19% of its net revenue was devoted to charity patient treatment, not including outpatient charity for which no figures were available but which was substantial. The corporation does not pay salaries to the doctors, officers, directors or trustees of the institution. Reasonable salaries are paid nurses and clerical help. The property is used strictly for hospital purposes . . . ." It was further found by the court that "the hospital makes reasonable charges to patients who are able to pay and serves without charge all patients seeking its services who are unable to pay. No patient is denied the use of the facilities or services of the hospital because of the inability to pay . . . no distinction is made between those patients who are able to pay and those who are not . . . ." It seems evident that the court considered the facts as showing the charity services as being a part of the operation of the hospital and not merely an incident thereto. The hospital was held entitled to the exemption claimed.

Under the authority of *Univ. Club v. Lanier*, supra, *Rast v. Hulvey*, supra, *Amos v. Jacksonville Realty and Mortgage Co.*, supra, and *Orange County v. Orlando Osteopathic Hosp.*, supra, as well as *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865, where the statement is made that a "mere incidental use for such purposes is not enough," that is, a mere incidental use for some religious, scientific, municipal, educational, literary or charitable purpose, is not sufficient to entitle the property to tax exemp-

tion. The use must be a primary and not an incidental or secondary use.

From the above and foregoing, we conclude that under §1, Art. IX, and §16, Art. XVI, State Const., for a nonprofit corporation or association to be entitled to tax exemption, as to their real and tangible personal property, such property must be "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes" (opinion of March 24, 1959, pp. 1 and 2 hereinabove.) The tax assessor for Duval county, on or before Aug. 30, 1960, laid the question directly to his attorney, involved in the file laid before us with your said request for an opinion; said attorney, upon the facts laid before him, in his letter of Aug. 30, 1960, to the said tax assessor, held that the facts before him failed to show that the property in question was held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose. We find nothing in the record before us sufficient to refute his finding and conclusion. A person, firm or corporation claiming an exemption from taxation has the burden of establishing his or its right to such exemption (p. 2 supra), unless the same may be established through judicial notice, which is not the case before us. For property to be exempt under the above constitutional provision, the use for some religious, scientific, municipal, educational, literary or charitable purpose must be an exclusive and not an incidental or secondary use.

The purposes for which a parcel of property are used and whether or not that use is an exclusive one is largely a question of fact to be determined by the tax assessor, subject to review by the board of equalization, and the courts if duly resorted to, and it is the obligation of the taxpayer claiming tax exemption to convince said parties of his or its right to the claimed tax exemption. The taxpayer having the burden of proof in this connection must prove his claim. We have attempted herein to outline the rules applicable to exemptions claimed under §1, Art. IX, and §16, Art. XVI, State Const., as well as the duty and burden of the taxpayer in connection with his claim for tax exemption.

060-159—September 21, 1960

**STATE OFFICERS AND EMPLOYEES**  
**USE OF TRAVEL REQUISITIONS UNDER §112.061, F. S. —**  
 §§323.03-323.05, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

**May travel requisitions issued under and pursuant to §112.061, F. S., be used in procuring u-drive-it auto service and transportation by private flying service?**

Section 112.061, F. S., relates to state officers and employees when traveling on official state business, fixing their per diem and travel expenses in this connection. We are here interested only in the travel expenses of state officers and employees. Said section, in this connection, provides that "the amount to be allowed for mileage when any state officer or employee is using a privately owned car shall be ten cents per mile; state officers and employees traveling *by any common carrier* on state business shall procure from the state comptroller and use a transportation request, which the comptroller is required to furnish the form of which shall

be substantially the same as now used by the federal government. . . ." The key phrase here seems to be the construction of "by any common carrier." Travel requisitions are authorized by this section of the statutes when a state officer or employee is "traveling by *common carrier*." Present §112.061, F. S., was derived from Ch. 26910, 1951, as amended by Chs. 29628 and 57-230, 1955 and 1957. Section 1 of said Ch. 26910 provided, in so far as here material, that "state officers and employees traveling *by railroad, bus or other common carrier* on state business shall procure from the state comptroller a transportation request. . . ." The term "traveling by railroad, bus or other common carrier," was changed, by the amendment made by Ch. 29628, 1955, to "traveling by common carrier," the title to which act contained nothing to indicate a broadening of the meaning of the latter phrase over the former. The phrase "traveling by common carrier," was used in the 1955 and 1957 amendments. (Emphasis supplied.)

Chapters 21913, 22830, 23892 and 25040, 1943, 1945, 1947 and 1949, fixed the per diem and travel expense of state officers and employees, each act covering the following biennium and expiring by its terms at the end thereof. Each of these acts provided that "state officers and employees traveling *by railroad, bus or other common carrier* on state business shall procure from the state comptroller a transportation request. . . ." (Emphasis supplied.) Chapter 16184, 1933, which became §112.06, F. S., and was superseded by the above 1943 act, contained an identical provision. Doubtless the change from "railroad, bus or other common carrier" to the term "common carrier" was with the idea that the terms "railroad" and "bus" were included in the term "common carrier," as used in the said statutes. The title to the acts using the term "common carrier," instead of the term "railroad, bus or other common carrier," reveals no purpose or intent to change the meaning of the phrases previously used. Under the rule of *ejusdem generis* where the enumeration of specific things (railroad and bus) are followed by the more general words or phrase (common carrier), the general words or phrase are construed to refer to things of the same kind or species as are included within the preceding limiting and more confining terms (*State v. Thompson*, Fla., 101 So. 2d 381, text 385; *Hanna v. Sunrise Recreation, Inc.*, Fla., 94 So. 2d 597, text 599-600; 30 Fla. Jur. 186 and 187, §86). Common carriage by railroads and buses, as is also common carriage by air, is regulated, including regulation as to rate for carriage, by either state or federal authority, or both. The Florida Statutes, at least since 1931, have distinguished between common carriers and private contract carriers, although both are included in the term "common carrier" in its broad meaning. We are of the opinion that the phrase "common carrier," as used in §112.061, F. S., above referred to, was intended to refer to common carriers, as used in §323.03, F. S., and not private contract carriers as used in §323.04 of the said statutes.

Chapter 323, F. S., appears to include u-drive-it vehicles as "for hire" common carriers of persons (see §323.05, F. S.), said §323.05(3), providing in part that "no such permit shall be required in respect to the operation of 'for hire' motor vehicles wholly within the limits of any incorporated city or town and the suburban territory immediately adjacent thereto, *when such 'for hire' carriage is regulated by the legislative body of such city or*



town. . . ." (Emphasis supplied.) Such for hire vehicles appear to be common carriers within the purview of §112.061, F. S., so that transportation requests may be used for the payment of charges therefor, provided the same be acceptable by the operator thereof. Section 112.061 does not appear to mandatorily require the acceptance of such transportation requests by common carriers.

Unless private flying services are regulated by some state or federal agency as to rates for carriage of persons, so as to bring them within the purview of "common carriers" as used in §112.061, F. S., as above construed, they may not be deemed "common carriers" within said section as to the use of transportation requests.

These observations seem to answer the above question as nearly as the same may be answered generally and without consideration of the particular facts involved in each particular case.

060-160—September 21, 1960

### TAXATION

GASOLINE AND LIKE PRODUCTS OF PETROLEUM — PRE-MIXED MOTOR FUELS — CHS. 207-209; §§207.01, 208.04, 209.01 AND 320.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Are mixtures of motor fuels and lubricants, used in the operation of two-cycle engines, gasoline or like products of petroleum within the purview of Ch. 208, F. S., and similar statutes and laws?**

The fuel mixture before us is claimed to be formed by the thorough mechanical mixing of a small proportion of polymeric lubricant additive with a liquid fuel such as gasoline or naphtha, usually in proportion of 6% by volume of the lubricant to 94% of the liquid fuel; however, for certain purposes there may be a slight variation of these proportions. This pre-mixed fuel finds use in two-cycle motor vehicle engines, outboard motor boat engines, and other vehicles and equipment powered by two-cycle engines. In connection with an examination and analysis of a sample of such fuel mixture by the state oil laboratory, in the department of agriculture, it was determined that the product examined did not meet the Florida standard for gasoline, although it had an octane number of 79.5. We have before us a copy of U. S. patent office patent 2,896,593, of July 28, 1959, relative to the preparation of such premixed fuel from which it appears that the mixture is produced "through mechanical mixing," not a chemical mixing. This seems to indicate a mixing of two products resulting in a mixture and not a different product through chemical or other reaction.

Chapter 208, F. S., imposes an excise tax on "gasoline and other like products of petroleum" sold in this state upon which tax has not, prior to sale, been paid or lawfully assumed (§208.04, F. S.) The term "motor fuel" is defined in §207.01, F. S., as including the petroleum products subject to taxation under Chs. 208 and 209, F. S. This being true, the mixtures of motor fuels and lubricants are subject to taxation under either Ch. 208 or 209, F. S., when intended for or used in motor vehicles as contemplated by the definition of a motor vehicle in §§209.01 and 320.01, F. S.,

and other like statutory definitions. We are here concerned with such mixtures when used in gasoline and similar motors and gasoline used for other purposes.

The term "other like products of petroleum," relates to any other products obtained from the processing of crude petroleum, either directly or indirectly, having properties and uses similar to gasoline. (University Dictionary; 25 Words and Phrases, 279; 53 C. J. S. 885.) A study of the authorities wherein the term "gasoline" is defined, referred to in 58 C. J. S. 20 and 21; 18 Words and Phrases, 140-142; annotations in 84 A. L. R. 878-880, and 111 A. L. R. 210-212, in connection with Chs. 207, 208 and 209, F. S., leads us to the view that said term "other like products of petroleum," has reference to other products obtained in connection with the processing of crude oil, and its products, like and similar in nature and capable of being used as a fuel for the operation of motor vehicles, whether efficiently or not, with a specific gravity, flash point and octane number above that of ordinary kerosene.

Where gasoline or other like products of gasoline otherwise subject to taxation under Ch. 208, F. S., are mixed or commingled with other products, such as a lubricant, the same continues to be subject to taxation in its mixed or commingled form, unless the required tax or taxes have been paid on the products so mixed or commingled.

The facts as related in the request for opinion indicate that the mixtures now involved have been mixed in other states and brought into Florida; this being true, the tax was due on the first sale or transaction in Florida.

The above observations answer the stated question in the affirmative, provided required taxes were not paid on the mixed or commingled products prior to mixing or commingling.

060-161—September 22, 1960

#### TAXATION

#### AD VALOREM — SUBJECTIVITY OF IMPORTS OF TANGIBLE PERSONAL PROPERTY

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**When does tangible personal property imported into this state from foreign countries become subject to ad valorem taxation under the laws of Florida?**

The said request for opinion raises the question of the application of the commerce clause (clause 3, §8, Art. 1) and the clause relating to imports and exports (clause 2, §10, Art. 1) U. S. Const., to the imported personal property and when the right to impose taxes on such property attaches or arises. We gather from the file submitted with the request for opinion, that the request is based on an import into Florida from another country (Finland) by a Florida corporation engaged in the import business which imported several hundred bundles or packages of lumber or hardboard, consisting of individual pieces of such lumber or hardboard, and totaling many thousand individual pieces of such lumber and hardboard. This particular lumber and hardboard was imported into this state through the port at Port Everglades, where, upon its arrival, the said lumber and hardboard were unloaded from

the freighters bringing the same into said port and stored in warehouses and other storage facilities in Broward county, subject to the direction and order of the importers. This lumber and hardboard were imported by the importer for sale to manufacturers, wholesalers and retailers, using or dealing in such lumber or hardboard, within or without this state, but within the U. S., wherever the demand therefor may exist. The said lumber and hardboard, prior to sale to such manufacturers, wholesalers and retailers, are stored by the importers, for their account, in various warehouses belonging to others, at the port of import, but not in warehouses or facilities of the importers. The lumber, upon acceptance and storage in the warehouses or other facilities, is vested in the importers, and in some instances portions may remain unsold for several months.

We are advised that other importers bring Chilean nitrate of soda from South America into the ports of Jacksonville, Tampa, Panama City and Pensacola, the same being stored in warehouses in like manner and dispose of the same in a manner similar to the disposal of the above mentioned lumber and hardboard. Most, if not all, of the said nitrate of soda so imported and stored is sold, as the demand arises, to fertilizer manufacturers, such sales being in bulk or in bags, as requested by the customers. No sales are made to the retail trade. Other types of property are doubtless imported by other importers, under like or similar circumstances and stored and disposed of under like and similar circumstances. These imports are not, so far as we are advised, disposed of by the importer to the retail trade.

"A state is prohibited, not only by the commerce clause of the United States Constitution, Constitution article 1, §8, paragraph 3, but also as to imports from foreign countries, by the clause forbidding a state from laying imposts or duties on imports or exports, Constitution article 1, §10, paragraph 2, from imposing a tax on goods transported into a state as long as they remain imports, or from levying a discriminating tax on foreign or domestic imports, even after they have become mingled with the common mass of property of the state. So long as goods from a foreign country remain the property of the importer, in the original form or package in which imported, they retain their character of imports and a tax on them by a state is unconstitutional, but after the goods have arrived in the state and have been sold or removed from their original packages or have by their use become mingled with, and part of, the general mass of property in the state, they lose their character as imports, and may be taxed in the same manner that other similar property in the state is taxed. . . ." (15 C. J. S. 458 and 459, §105.)

Paragraph 2, §10, Art. I, Fed. Const., "necessarily extends to state taxation of things imported, *after their arrival and so long as they remain imports*" (Hooven and Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252, text 1258.) The court, (L. ed., text 1259), in Hooven and Allison Co. v. Evatt, supra, stated that "although one Justice dissented in Brown v. Maryland, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for

*which they are imported. . . .*" (Emphasis supplied.)

In 1 Cooley on Taxation, 4th Ed., 899, §413, it is stated that imported articles of property "do not lose their character as imports, so as to become subject to state taxation as a part of the mass of property of the state, *until they have either passed from the control of the importer or been broken up by him from the original cases*; and a state tax is void whether imposed upon them distinctively as imports or as constituting a part of the importer's property. On the other hand, imports are taxable after sale by the importer or after being mingled by breaking up of the original package, provided there is no unjust discrimination on account of the goods being imported goods. Goods purchased after arrival in this country are taxable, since such a purchaser is not an importer." (Emphasis supplied.)

Although Anglo-Chilean Nitrate Sales Corporation v. Ala., 288 U. S. 218, 53 S. Ct. 373, 77 L. ed. 710, does not appear to have involved an ad valorem tax imposed upon imported property, but a tax based upon a corporation doing business within the state, measured by the amount of business transacted within the state, the facts involved were summarized by the court (L. ed., text 712 and 713) as showing that "the appellant was engaged in the business of importing nitrate through the port of Mobile and other ports. The nitrate, in bags containing about 100 pounds each, was brought into Mobile and there stored by appellant in a public warehouse and kept in the original packages until sold and delivered to the ultimate consumers. All was sold upon orders through a salesman who, paying his own expenses, was compensated by commissions on his sales. The orders were taken subject to approval and were not effective until approved by appellant in its New York office. When so accepted, directions were given that the nitrate be forwarded to the customers. These directions were given to and carried out by the Walsh Stevedoring Co. at Mobile, an independent contractor, having an arrangement with appellant to handle its importations of nitrate, store it in a public warehouse and forward it as directed. All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. . . ." The transactions above described were held to have taken place prior to the time the property imported ceased to be imports and while under the protection of the import and commerce provisions of the federal constitution, so that the tax based thereon was invalid.

In Low v. Austin (1872), 13 Wall (US) 29, 20 L. ed. 517, "it was held that imported wine was not subject to a state tax while remaining in the original cases, unbroken and unsold, even though it was exposed in the store of a merchant (evidently wholesaler or distributor) for sale. This decision was cited with approval in Gerdan v. Davis (1901) 67 NJL 88, 50 A. 586." In Siegfried v. Raymond (1901) 190 Ill. 424, 60 NE 868, "it was held that a state might not tax tea imported from foreign countries while it was in storage in a government warehouse in the original unbroken packages." In Re Pitkin (1901) 193 Ill. 268, 61 NE 1048, "it was held that a general property tax imposed upon appellants on all their property, including imported goods, was invalid as to the imported goods, though the goods were not stored in government



bonded warehouses *but in their own warehouses.*" (Emphasis supplied.)

Although the nitrates involved in *Re Texas Pacific Guano and Fertilizer Co.*, 32 Hawaiian 431, had been removed from the bags in which imported, as a *fire prevention measure*, and stored in bins, the court held that the nitrates continued to be imports within the purview of the imports clause in the federal constitution, and were, therefore, not subject to taxation so long as they continue to be imports. In *U. S. v. Five Boxes of Asafoetida*, DC., 181 Fed. 561, asafoetida imported in a box was held to continue as an import *notwithstanding the opening of the box for purposes of inspection* to determine standard strength, quality and purity. In *Re McAllister*, D. C., 51 Fed. 282, the same rule was followed as to packages of oleomargarin opened for inspection, and in *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 NW 888, 109 St. Rep. 961, the same rule was followed as to sponges where containers were opened for inspection. The court, in *Southern Pacific Co. v. Calexico*, D. C., 288 Fed. 634, text 642, after posing the question as to whether the imported property had been kept segregated from the general mass of the property of the state *in such way that it could always be identified*, and not subjected to any beneficial use, said that "so long as such was done, I am constrained to hold that it continued to maintain the quantity of an import as opposed to a piece of property subject to state taxation." In this case the compressing of packages or bales of cotton so as to reduce their size was held not to change their status as imports or exports.

The annotator of the annotation in 89 L. ed. 1289, states that "in order to take full *advantage of the original package doctrine*, some importers adopted the device of having goods wrapped in very small packages; but this practice was denounced judicially as a misuse of the doctrine. In *May v. New Orleans* (1900) 178 US 496, 44 L. ed 1165, 20 S. Ct. 976, M. was engaged at New Orleans in the business of importing goods from abroad and selling them. The goods were imported in large boxes or cases in each one of which there were many packages, each of which was separately wrapped and marked and sold separately. M. contended that the original package doctrine of *Brown v. Maryland* (1827) 12 Wheat (US) 419, 6 L. ed. 678, applied to each separate package and that therefore such packages were not subject to state taxation until sold. The Louisiana court rejected this contention and held that the box, case, or bale was the original package. . . ." The supreme court affirmed the holding of the Louisiana court.

The issue in the case of *E. J. Stanton and Sons v. Los Angeles County*, 78 Cal. App. 2d 181, 177 P. 2d 804 (certiorari denied 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352) as stated by the court, "revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation. Respondent contends that so long as any parcel of the entire lot remains in the possession of the importer it is not subject to state taxation prior to sale; that each parcel or board is marked so as to distinguish it from all others and is therefore in itself an original package. Appellants argue that by the sorting, segregating and tallying of the timbers and by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation. As proof of the in-

corporation of the remnants of shipments into the mass of the county's property it was developed that it might be a number of years before a particular cargo is entirely sold out, and if a few odd pieces are left in a bin a new shipment of the same type from the same producer is put into the same bin." On these facts the court held that "the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with a silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package. A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of §10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber. The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) the United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipment is determined by board feet except in the purchase of *lignum vitae* logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." (177 P. Rep. 2d 807-808.)

In *Export Leaf Tobacco Co. v. Los Angeles County*, Cal. App., 202 P. 2d 622, certain leaf tobacco, shipped by boat from New York and Newport News, on the east coast of the U. S., to Hong Kong, China, by the Export Leaf Tobacco Co., was, because of the beginning of the war with Japan, and at the direction of the U. S. navy, unloaded and stored in warehouses at the port of Los Angeles, California. This tobacco, being so stored on the tax day under California law, was assessed for ad valorem taxes, for the tax year beginning on the first Monday in March, 1942, on the theory that it had acquired a tax status in California. The court concluded that "the tobacco was in the course of foreign and interstate movement and in transit on the taxing date," and not subject to taxation. In *Simon v. Los Angeles County*, Cal. App., 296, p. 381, the court, after stating that the "mere size of the container is not the criterion of original packages," when used in connection with imports, further stated that the presumption of original package attaches only *when the importation is made in the usual manner*

prevalent among honest dealers, and in bona fide packages of a particular size.

In *Washington Chocolate Co. v. King County*, 21 Wash. 2d 630, 152 P. 2d 981 (certiorari denied in 324 U. S. 880, 65 S. Ct. 1022, 89 L. ed 1022), the court stated that it found no reason or authority for distinguishing between imports intended for sale and those intended for use by the importer in some manufacturing process. In this case the court remarked that the chocolate company should not be penalized because it imported large quantities of raw materials, which were the chief ingredients of its manufactured products. In *American Mfg. Co. v. St. Louis*, 238 Mo. 267, 142 S. W. 297, the court remarked that "while we hold that the jute butts owned and held by the plaintiff in the original packages, for use in its factory, are in a sense not taxable by the defendant, it would be unreasonable to allow plaintiff to import and store such property in the state and hold it exempt from taxation for any longer period of time than is necessary to manufacture same in the ordinary course of its business. If the jute butts in question were imported and stored for the purpose of obtaining the benefit of a prospective advance in the price thereof, then the taxes levied thereon are legal." (Emphasis supplied.)

In *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 65 S. Ct. 870, 89 L. ed 1252, text 1260, the court remarked that the importer's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether the relationship was so altered after importation that it can be said that the purpose of the importation has been fulfilled. If it has, there is no longer either occasion or reason for further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending importation, particularly as shown by the long established course of business by which the importer's supply of materials have brought into this country for use in manufacturing its finished product. In *Heve v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. ed 255, it was held that the fiber cases containing either 48 one pound cans, or 96 six ounce cans, of a product, were the original packages for purposes of interstate commerce, under the facts and circumstances there involved, and not the one pound or six ounce cans. "An original package, as applied to interstate and international commerce is a package, bundle or aggregation of goods, put up in whatever form, covering or receptacle for transportation, and as a unit transported from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the identical point of shipment, in the exact condition in which it was shipped. Tank cars or steamers used to transport oil are ordinarily not only the vehicles but the original containers for interstate transportation. Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package, and this is true, although each bottle or package is separately wrapped in paper labeled 'original package' and marked with the name of the importer, and although the larger container is furnished by the carrier." Under some circumstances the smaller packages have been held to be the original package (15 C. J. S. 310, §28.)

*Youngstown Sheet and Tube Co. v. Bowers*, 358 U. S. 534, 79

S. Ct. 383, 3 L. ed 490, appears to be the latest expression of the supreme court of the U. S., concerning the question here considered. The opinion of the court, in this case, considered a tax levy made by the tax commissioner of Ohio, against the Youngstown Sheet and Tube Co., and a tax levy made by the city of Algoma, Wis., against the U. S. Plywood Corp., each such tax levy involving properties imported from foreign countries and used in manufacturing carried on by each such corporation or company. We quote from the court's opinion as to the stipulated facts in the Youngstown case, as follows:

In essence, they are that Youngstown, an Ohio corporation operates an industrial plant in or near Youngstown, Ohio, where it manufactures iron and steel. In addition to the use of domestic ores, it imports iron ores from five countries "for ultimate use in (its) open hearth (and) blast furnaces" in its manufacturing processes. The imported ores arrive in shiploads "in bulk" either at an Atlantic or a Lake Erie port of entry where they are unloaded from the ship into railroad cars and are thereby transported to Youngstown's plant in Ohio. The plant is enclosed by a wire fence. Within the enclosure and "adjacent to (the) manufacturing facilities" are several "ore yards" for the storage of supplies of ore. Each ore yard consists of "two parallel walls, on which there (is) a movable ore bridge." When the imported ores arrive in this final destination, they are unloaded into one of the ore yards, but, because the ore from each country is different from the others and each is imported for a different use, the ores are kept segregated as to the country of origin by being "placed in a separate pile in a separate area of the ore yard." The daily manufacturing needs for ore are taken from these piles. As needed, ores are conveyed from the particular pile or piles selected to "stock bins" or "stock houses," holding one or two days' supply and located in close proximity to the furnaces, from which the ores are fed into the furnaces. As ore from a particular "pile" in the ore yard is thus taken and consumed, other like ore is similarly imported from the same country and is brought to the plant and unloaded on top of the remainder of that particular pile. This course is continuously repeated. Youngstown endeavors to maintain "a supply of imported ores to meet its estimated requirements for a period of at least three months." The ores are not imported "for resale," but "for use in manufacturing (at the Ohio plant)"

And from the court's opinion, as to the facts as found by the trial court and accepted by the supreme court, as follows:

. . . In essence, they are that United States Plywood Corporation (petitioner) operates an industrial plant in Algoma, Wisconsin, where it manufactures veneered wood products. It uses both domestic and imported lumber and veneers in its manufacturing processes. The imported lumber is shipped in railroad cars directly from Canada to petitioner's plant. It is unfinished, and is received in bulk or as loose, individual pieces or boards. It is also "green" when received and therefore must be dried before it can be used by petitioner. Upon arrival at destination, it is un-



loaded and carted to petitioner's storage yard, located "adjacent" to its plant, where it is stacked in the open in such a way as to allow the air freely to circulate through the stacks for the "dominant purpose" of air-drying it. This method does not so completely dry the lumber as to make kiln-drying unnecessary, but it does materially reduce the time and expense of that process. From time to time, so much of the lumber as is about to be put into veneered products is taken from the stacks and placed in a kiln where the drying is completed and the lumber readied for use. The veneers are imported from three countries. They are received in bundles and are kept in that form in piles, separated as to specie, in petitioner's plant for use as needed in the day-to-day operations of the plant.

On the assessment date of May 1, 1955, the Assessor of the City of Algoma, acting under what is now Wis. Stat. 1957, §70.01, assessed a tax against petitioner based upon the value of one-half of the imported lumber and veneers then on hand. . . . The court further found that the lumber and veneers had been imported by petitioner "for use in manufacturing" at its Algoma plant, and that their importation journey's definitely had ended; that the lumber and veneers that were taxed (one-half of the amounts on hand) had been irrevocably committed to "use in manufacturing" at that plant, were "necessarily required to be kept on hand to meet (petitioner's) current operational needs," were being "used in manufacturing," and had therefore "lost their character as imports" and were subject to local taxation. . . .

The court, in its opinion, states that:

The stipulation in the Youngstown Case shows that the imported ores were essential to the operation of Youngstown's Ohio plant; that Youngstown had imported them "for use in manufacturing" and "to meet its estimated (manufacturing) requirements" at that plant; that the ores had arrived at their destination, had been placed in "piles" in the "ore yards" of that plant, and their importation journey definitely had ended; that the ores were irrevocably committed to "use in manufacturing" at that plant and point of final destination; and that the daily ore needs of the plant were conveyed from the "piles" in the "ore yards" to "stock bins" or "stock houses," holding one or two days' supply, from which they were fed into the furnaces. Does not the stipulation thus show that the ores were not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the daily requirements of the plant? It seems to us that these stipulated facts inescapably establish that Youngstown had "so acted upon the (imported ores)" (*Brown v. Maryland*, supra ((US) 12 Wheat at 441)), for which they (were) imported, that they must be held "to have then entered the manufacturing process" (*Hooven & A. Co. v. Evatt*, supra (324 US at 665,667)) and to have lost their distinctive character as "imports" and all tax immunity as such.

And that:

In the United States Plywood Corp. Case, two types of imported materials are involved—unfinished “green” lumber received “in bulk” and veneers received in “bundles.” The Assessor of the City of Algoma, believing that one-half of the lumber and veneers on hand at the taxing date was necessarily required to be kept on hand to meet the current operating needs of petitioner’s manufacturing plant, assessed an ad valorem tax upon the value of that one-half of the lumber and veneers. In the ensuing litigation, the Wisconsin courts found that the imported materials had been imported by petitioner “for use in manufacturing” at its Algoma plant, had arrived at that place and that their importation journeys definitely had ended; that the lumber and veneers that were taxed (one-half of the amounts on hand on the taxing date) had been irrevocably committed to “use in manufacturing” at that plant, were “necessarily required to be kept on hand to meet (its) current operational needs,” and were actually being “used” to supply those needs. These findings are amply supported by the evidence and are not contested here. We think they clearly show that the lumber and veneers that were taxed were not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the day-to-day manufacturing requirements of the plant. They thus establish that petitioner had “so acted upon the (imported materials)” (Brown v. Maryland, supra ((US) 12 Wheat at 441)) that were taxed by making them “for the purpose for which they (were) imported,” that—like the ores in the Youngstown case—they must be held “to have then entered the manufacturing process” (Hooven & A. Co. v. Evatt, supra (324 US at 665, 667)) and to have lost their distinctive character as “imports” and all tax immunity as such.

Upon the question of packaged goods or “bundles,” the court remarked:

The fact that the veneers were received in “bundles” which were not opened until the veneers were put into the daily manufacturing operations of the plant is not controlling under the facts and findings here. Whatever may be the significance of retaining in the “original package” goods that have been so imported for sale (Brown v. Maryland (US) supra; Waring v. Mobile (US) 8 Wall 110, 122, 123, 75 L. ed 342, 346; Low v. Austin (US) 13 Wall 29, 32, 33, 80 L. ed. 517, 519; Cook v. Pennsylvania, 97 US 566, 573, 24 L. ed 1015, 1018; May v. New Orleans, 178 US 496, 501, 507, 508, 44 L. ed 1165, 1167, 1169), *goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the “original package,”* if, as found here, they have been “put to the use for which they (were) imported.” Hooven & A. Co. v. Evatt, supra (324 US at 657.) Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them “to the use for which they (were) imported.” . . . (Emphasis supplied.)

We have quoted at length from the Youngstown case because of its importance upon the question of the termination of the status of an import of property under the export and import clause of the federal constitution, where the import was specifically for use by the importer in connection with the manufacture of products from the imported materials.

Imports being involved, it is important that we keep in mind the intent and purpose of clause 2, §10, Art. I, Fed. Const., relative to imports, concerning which the court in *Youngstown Sheet and Tube Co. v. Bowers*, supra, said that "the design of the constitutionality was to prevent the great importing states from laying a tax on the non-importing states to which the imported property is or might ultimately be destined, which would not only discriminate against them but also 'would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation.'" This immunity continues only so long as the imports retain their distinctive character as imports. The design of the constitutional provision "is not impinged by taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been put to the use for which they were imported, for in such case they have lost their distinctive character as imports and are subject to taxation." (*Youngstown Sheet and Tube Company v. Bowers*, supra.) Goods imported for "use" share the same immunity as goods imported for "sale" and goods imported for manufacture do not lose their character as imports any sooner or more readily than imports for sale. (*Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252, cited in *Youngstown Sheet and Tube Co. v. Powers*, supra, L. ed., p. 496.) The question always present in connection with state taxation of imported goods is whether or not the importer has so acted upon the things imported so that it has become incorporated and mixed up with the mass of property of the state. This immunity was said, in *Hooven and Allison Co. v. Evatt*, supra, to continue only until the imported goods "*are sold, removed from the original package, or put to the use for which they are imported.*" (Emphasis supplied.)

The authorities upon the question of what constitutes an original package, in connection with imports, are summed up in 11 Am. Jur. 53, §57, as follows:

The gist of the decisions seems to be that in general an original package is that package which, according to custom respecting the particular article shipped, is usually delivered by the vendor to the carrier for transportation and delivery to the vendee.

Where an aggregation of articles or packages is, for convenience in shipping, packed and shipped in larger packages or receptacles, the larger package or receptacle, and not the individual articles or packages, usually constitutes the original package, even though the larger receptacle be unfastened or uncovered (11 Am. Jur. 55, §60.) As a general rule such a receptacle is regarded as an original package only until it is broken or so treated for purposes of sale by the importer to render it a part of the mass of the property of the state.

From the above and foregoing, it may be generally stated that personal property imported from foreign countries into this

state become subject to its ad valorem taxes when (1) they have passed from the control of the importer, (2) have been broken up by the importer from the original package, or (3) have been put to the use for which imported. Property imported into this state and stored in a warehouse or otherwise by the importer for a long period of time raises a question of fact as to whether it was intended for sale in the usual course of business or as an investment depending upon an increase in price. The question of whether an import has passed from the control of the importer, has been put to the use for which imported, or the original package has been broken, so as to terminate its status as an import, is primarily one of fact to be determined by the tax assessor, according to the rules hereinabove referred to and as set out by the authorities cited and referred to, and the application of the facts in each particular case thereto.

060-162—September 22, 1960

#### TAXATION

#### EXCISE TAX ON DOCUMENTS — CONSTRUCTION OF §§201.01 AND 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are promissory notes, made, executed and delivered in other states, and brought into this state by the payee or holder thereof, either in person or by agent, not by mail or common carrier, subject to taxation under §§201.01 and 201.08, F. S.?

This office, by its opinion of March 25, 1958 (058-106; 1957-58 AGO 613), held that a promissory note, made, executed and delivered in another state, but sent into this state by mail or common carrier (shipped) was liable to taxation under said §§201.01 and 201.08, F. S. Promissory notes, as well as the other instruments mentioned in said §§201.01 and 201.08, F. S., are subject to taxation in this state when *made, signed, executed, issued, sold, removed, consigned, assigned or shipped* in this state. From the question posed, it appears that the instrument in question was "made, signed, executed and issued" in another state, and not subject to taxation under said §§201.01 and 201.08 as an instrument, made, signed, executed, or issued in this state. The question posed does not contemplate that the instrument mentioned has been sold, consigned or assigned. Has the instrument in question been *shipped or removed* in (into) Florida?

An examination of the words "ship" and "shipped," as they appear in 80 C. J. S. 558-560, and 39 Words and Phrases, 259-262, reveals that the usual meaning of these words is the sending of articles by common carrier or other established means of transportation. The taking of a promissory note, by its owner, either in person or by agent, from one place or state to another place or state would not be a shipping of such note within the purview of said §§201.01 and 201.08, F. S.

An examination of the words "remove" or "removed," as they appear in 76 C. J. S. 1161 and 36 Words and Phrases 849-865, reveals that the terms mean or contemplate a change or shift of location; a transfer or change of place or location. When the



promissory note contemplated by the above question was brought from another state into Florida, it was removed from that state to Florida, and is within the rule of our opinion of March 25, 1958, above mentioned.

The above question is, therefore, answered in the affirmative upon the rule announced in said opinion of March 25, 1958.

060-163—October 10, 1960

**STATE DEPARTMENT OF PUBLIC WELFARE  
DEPENDENT CHILDREN—LIABILITY OF FOSTER PARENTS;  
OF DEPARTMENT, FOR PERSONAL INJURIES—§§409.03  
AND 409.04, F. S.**

*To: Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

**QUESTIONS:**

1. Are foster parents liable if a child is injured who has been placed in their home by the department of public welfare?

2. What is the nature and extent of a worker's liability if a child is injured while being transported by the worker?

3. What is the nature and extent of the department's liability if a child under its care and supervision does personal or property damage to foster parents or their property when the child has been placed in their home by the department?

Sections 409.03 and 409.04 F. S., provide, among other things, that the department of public welfare may place a child (upon the written consent of its parents or guardians or after a judicial hearing) in a foster home under such conditions as shall be determined to be for the best interests or the welfare of the child.

Section 409.05, F. S., provides, among other things, for the department of public welfare to license such foster homes and to set minimum standards for the care of a child or children awarded to such homes. Said section further provides for the revocation of such license for violation of the rules and regulations of the department governing the activities of the license.

The law is silent relating to the liability of a foster parent or home, such as those licensed by the department. However, it would appear that the foster parent does not assume any liability beyond that which the law, relating to torts, has imposed.

In 52 Am. Jur., p. 369, §12, we find the following:

*Duty to Refrain from Acts Harmful to Others.*—A duty with which the law of torts is concerned is to avoid causing harm to others. In this respect, it has been stated as a general and wholesome rule of law that whenever, by an act which cannot be justified in law, and which he could have avoided, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured. Under this rule, one injured by the wrongful act of another to which he has in no respect contributed is entitled to compensation from the wrongdoer. In determining whether an act is wrongful, a test frequently applied is the ability of a prudent man in the exercise of ordinary

care to foresee that injury or damage will naturally or probably result.

Replying to question 1, in view of the foregoing and in the absence of any rule or regulation or contractual obligation to the contrary, it is my opinion that the foster parent does not incur any personal liability for injuries to a child placed in the home by the department *except for injuries caused by the negligence or other wrongful act of the foster parent.*

Replying to questions 2 and 3, it is my opinion that both questions are answered in my opinions 055-259 and 060-95, respectively.

060-164—October 11, 1960

#### TAXATION

COUNTY TAX EQUALIZATION BOARDS—POWERS AND DUTIES IN RELATION TO TAX EXEMPTIONS—§§193.25, 193.27 AND 192.19, F. S.; §1, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

May county tax equalization boards, existing under and pursuant to §193.25, F. S., review the action of the tax assessor in denying applications for tax exemption and grant the same in whole or in part?

An examination of §§193.25 and 193.27, F. S., reveals that the purpose of county tax equalization boards is the "*perfecting, reviewing and equalization of the*" county tax assessments, and that such equalization boards may hear complaints of taxpayers and *equalize the assessments by lowering or increasing them*, so as to "secure a just valuation of all property, both real and personal," as required by §1, Art. IX, State Const. Under this section of the constitution the legislature may provide for the exemption from taxation of properties held and used exclusively for "municipal, education, literary, scientific, religious or charitable purposes." Other exemptions from taxation are provided in the state and federal constitutions; one of the exemptions provided in the federal constitution is the exemption of imports from state taxation so long as they retain their status as imports (see opinion 060-161, Sept. 22, 1960). Such boards may, for the purpose of tax equalization, "*raise or lower the value fixed by the county assessor of taxes on any particular piece or parcel of real estate, or item or items of personal property.*" Section 192.19, F. S., gives the said board authority to review the action of the assessor in denying an application for homestead tax exemption.

From 3 Cooley on Taxation, 4th Ed., 2389, §1194, we find that tax equalization, such as that provided by said §§193.25 and 193.27, F. S., consists of the "review of an assessment on particular property, *where it is claimed that it is not taxable property*, or that it has been over valued or under valued or that the assessment is otherwise invalid." Such tax equalization boards are agencies "established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions." (84 C. J. S. 979, §512). Their main purpose is review and correction of tax assessments made by the county assessor of taxes. Such boards have no power or authority to make blanket increases or decreases, but only to equalize (*Armstrong v. State,*

Fla., 69 So. 2d 319, text 321 and 322). In this connection see also *Saunders v. Crapps*, Fla., 45 So. 2d 484, and *Hoffman v. Land*, Fla., 55 So. 2d 806.

An assessment of a tax against property entitled to tax exemption amounts to an over assessment or valuation of the property; it is an excessive assessment. If an assessment is either low or high, the board may equalize the same by lowering or raising the assessment to conform to legal requirements. The taxation of exempt property is a high or excessive assessment subject to correction by the county board of tax equalization. An assessment of exempt property is within the jurisdiction of such boards and may be equalized by remedying the excessive assessment and allowing the exemption claimed.

The above question is, therefore, answered in the affirmative.

060-165—October 11, 1960

### TAXATION

#### DOCUMENTARY STAMP TAXES — RECONVEYANCE OF VENDEE'S INTEREST TO VENDOR

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

**Are documentary stamp taxes due on a conveyance of the vendee's interest to the vendor in satisfaction of vendee's obligation under the contract to convey, and if so, what is the measure of the taxes due?**

It is our understanding from the file handed us with the request for opinion that the contracts to convey real property were on the form also handed us with the request for opinion, which documents purport to be agreements between a vendor and vendee for the sale and conveyance of the parcel or parcels of real property therein described. Under these agreements the vendor agrees to sell and convey to the vendee the property described upon the payment of the consideration therefor provided for in and by said agreement. Under the terms of such agreements, the vendee "covenants and agrees to pay to the seller, at such places as the seller may from time to time designate," the amount of the purchase price mentioned in the agreement. We have here a binding agreement to pay the purchase price for the property described in the agreement at the time or times and place or places mentioned in said agreement.

The vendor in such a contract to purchase and convey, upon the failure of the vendee to make the payments required may bring an action in damages for the breach, or for the purchase price remaining unpaid (*Clements v. Leonard*, Fla., 70 So. 2d 840, text 842; 92 C. J. S. 309-310, §375; 55 Am. Jur. 900, §509), or he may proceed to enforce his equitable lien for the unpaid purchase price by a proceeding in equity in the nature of a foreclosure against the equitable title of the vendee (*Miami Bond and Mortgage Co. v. Bell*, 101 Fla. 1291, 133 So. 547, text 548; *Soderberg v. Davis*, 118 Fla. 288, 159 So. 23; 92 C. J. S. 310, §375, note 38; 55 Am. Jur. 859, §454). Most reconveyances of the equitable title of the vendee to the vendor, in such cases, are given in full settlement of the obligations of the vendee under the contract of sale. There is little, if any, legal difference between a conveyance by a mortgagor to a mortgagee, of the mortgaged

property, in settlement of the unpaid balance of the indebtedness secured by the mortgage and a reconveyance by a vendee to his vendor in settlement of the unpaid balance of the purchase price; in either case the consideration for the conveyance is the cancellation of the indebtedness secured, in one case by the mortgage, and in the other by the vendor's lien, or lien in the nature of a vendor's lien. The consideration in either case is the cancellation of the obligation secured by the mortgage or lien.

Under federal tax regulation 43.4361-2, among the conveyances deemed subject to the federal documentary stamp tax statute, is "a conveyance by a defaulting mortgagor to the mortgagee in consideration of the cancellation of the mortgage debt. The tax is computed on the amount of the unpaid mortgage debt plus accrued interest." This regulation was upheld in *Railroad Federal Savings and Loan Ass'n v. U. S.*, CCA 2d, 135 Fed. 2d 290, 135 A. L. R. 581, and *Mutual Life Ins. Co. v. U. S.*, 124 Ct. Cl., 632, 110 Fed. Supp. 606 (Cert. denied 346 U. S. 817, 74 S. Ct. 29, 98 L. ed. 344). These cases deemed the consideration for the cancellation of the mortgage to be the amount of the indebtedness secured by the mortgage, including accrued interest, which was cancelled or forgiven—the reduction in the obligation of the mortgagor to the mortgagee. We see no real distinction between the cancellation of an indebtedness secured by a mortgage and the cancellation of an indebtedness secured by a vendor's lien, or the implied lien of a contract to purchase real estate, either reduces the obligation of the mortgagor or the vendee under the contract to purchase.

The above question is, therefore, answered in the affirmative, where the indebtedness of the vendee or purchaser is cancelled or otherwise rendered unenforceable; the measure of the tax payable being determined by the amount of the indebtedness cancelled or otherwise rendered unenforceable, by reason of the reconveyance of the legal or equitable title to the mortgagee, or the vendor.

060-166—October 11, 1960

#### CORPORATIONS—TAXATION

AGRICULTURAL COOPERATIVE MARKETING ASSOCIATIONS—CAPITAL STOCK—TAXES—CH. 618, §§618.01, 618.15, 618.25, 199.07, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Is the capital stock of an agricultural cooperative marketing association, issued pursuant to Ch. 618, F. S., with par value, subject to intangible personal property taxes, and if so, what is its measure of value for taxation purposes?

2. If the reserves and surplus, and the net income in addition thereto, are not to be considered when determining the value of the corporate stock, then are the rights or interests of members of the cooperative therein subject to intangible personal property taxes?

The particular cooperative marketing association appears to have been organized and incorporated under statutes and laws of this state now appearing as Ch. 618, F. S., with par value



common stock and preferred stock, both classes of which are outstanding. Associations organized and incorporated under said Ch. 618 are "deemed 'non-profit' inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, *but only for their members as producers.*" (Emphasis supplied.) (§618.01(4), F. S.) Such associations have authority to purchase, own and hold such property and properties as may be necessary for the carrying on of the cooperative venture; however, any profits made by the association are not deemed to be profit of the association as such, but for its members as producers. Such associations may, by vote of their directors, "establish and accumulate reserves out of earnings, including a permanent surplus fund as an addition to capital. *Net income in excess of additions to reserves and surplus so established shall be distributed to members on the basis of patronage. Any distribution of reserves and surpluses at any time shall be made to members, at the time such distribution is ordered, on the basis of patronage.*" (Emphasis supplied.) (§618.15, F. S.)

The supreme court of Iowa, in *Green County Rural Elec. Coop. v. Nelson*, 234 Iowa 362, 12 N. W. 2d 886, text 888, quoted from certain authorities, relative to the nature of cooperatives, as follows:

In *Hannah on "The Law of Cooperative Marketing Associations"*, page 50, it is stated: "The essential idea in the term 'non-profit' is clearly that such corporations are not designed primarily to pay dividends on invested capital but to provide a system and method by which the member can effect the sale of his products."

In "The Law of Cooperative Marketing," by Evans and Stokdyk, page 3, it is stated: "The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of products marketed through the association by the respective members."

In 90 *Univ. of Pa. Law Review*, page 151, it is stated: "A fundamental principle applicable to all cooperatives is the avoidance in the organization of entrepreneur profit. Patronage refunds, therefore, are not to be considered as a division of the profits. They are rather a return of the over-charge."

In *U. S. v. Rock Royal Coop.*, 308 U. S. 533, text 564, 59 S. Ct. 1008, 83 L. ed. 1446, text 1465, the supreme court remarked that "the producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amount to its patrons."

In *San Joaquin Valley Poultry Protective Ass'n v. Commis-*

sioner of Revenue, CCA 9th, 136 Fed. 2d 382, text 385, the court, concerning the reserves maintained by the cooperative, stated that "the fact that the sums were not available to the member on demand, or at any fixed time, does not alter the fact that they were their property and not petitioner's. Petitioner held them, not as owner, but as agent or trustee for the members."

From the above and foregoing, it is apparent that funds allocated to reserves and surplus, as well as unallocated net income, are to be distributed (if and when distributed) not according to stock ownership, but on the basis of patronage of the members of the association. Such surpluses, reserves and unallocated net income of such cooperatives are subject to distribution, not to the stockholders in ratio to the common stock ownership, but upon the basis of member patronage. This being true, such surpluses, reserves and unallocated net income may not be taken into account and consideration when determining the value of such shares of stock for intangible tax purposes. Only when stock ownership and patronage was the same as to each member of the association would the capital and the distribution of the surpluses, reserves and net income be upon the same basis as to members; this would be an exception to the rule. Surpluses, reserves and net income, not being a part of the capital structure of the cooperative, the value of each share of capital stock must be determined from the capital account itself, which does not include surpluses, reserves and net income. We, therefore, hold that the capital stock of such cooperatives are subject to taxation upon the above basis.

Having determined that reserves, surplus and net income are not to be taken into consideration when determining the value of the capital stock of a cooperative for purposes of taxation, but are to be distributed to members on the basis of patronage if and when distributed, we come to the question of the taxation of the rights and interests of the members in and to the reserves, surplus and net income. The statement is made in *San Joaquin Valley Poultry Protective Ass'n v. Commissioner of Revenue*, supra, that cooperatives hold their reserves, surplus and net income or excess "not as owner, but as agent or trustee of the members," in the absence of statutory provisions, or provisions in by-laws or the charter, providing otherwise. An examination of *Clearwater Citrus Growers' Association v. Andrews*, 81 Fla. 299, 87 So. 903, text 904; *Ozone Citrus Growers' Ass'n v. McLean*, 122 Fla. 188, 165 So. 625, text 626; *Adams v. Sanford Growers' Credit Corp.*, 135 Fla. 513, 186 So. 239, and 151 Fla. 178, 9 So. 2d 713; *Massaro v. Tampa Better Milk Producers Coop.*, 146 Fla. 64, 200 So. 211; *Winter Garden Citrus Growers' Ass'n v. Willits*, 113 Fla. 131, 151 So. 509, reveals that in the absence of a statute, charter provisions or by-laws providing otherwise, one voluntarily withdrawing from such a cooperative has no interest in its reserves, surplus and excess income. However, cooperatives dissolved in accordance with §618.25, F. S., after the payment of its debts and obligations, make distribution of remaining assets "among its members in proportion to their respective property interests." It, therefore, appears that the interest of a member in a cooperative association is inchoate in nature.

Although some courts hold that both the equitable and legal title to corporate property are in the corporation, others hold that the legal title is in the corporation and the equitable title in the stockholders (18 C. J. S. 1189 and 1190, §512). The rule in Florida

appears to be that both the legal and equitable titles are in the corporate entity (*Marks v. Green*, Fla. App., opinion filed July 21, 1960, but not yet reported). The interest of a stockholder in a Florida corporation seems to be a right to share in the surplus, after the payment of debts and obligations, upon a dissolution or liquidation (18 C. J. S. 1191, §512). The reserves, surplus and net income are not fixed rights that may be demanded by the members of a cooperative, unless otherwise provided by the charter or by-laws, prior to dissolution or liquidation. They are nothing more than inchoate rights. The reserves, surplus and net income, or the property in which invested, being property of the cooperative, are subject to taxation as corporate property, but not to the members as such. We doubt that the cooperative association, prior to the declaration of a dividend to members of such surplus, reserves and net income, may be said to be a trustee, within the purview of §199.07, F. S., required to return such surplus, reserves and net income as trust property. The interest of the member is more in the nature of an equity or right upon dissolution or liquidation than an equitable title within said §199.07, F. S.

This leads to a negative answer to question 2, unless and until the member's interest has been segregated and allocated to him as a dividend, or upon liquidation or dissolution.

060-167—October 11, 1960

#### BEVERAGE LAW

#### CONSTRUCTION OF §561.20, F. S. ART. XIX, STATE CONST.— SMALL INCORPORATED MUNICIPALITIES

To: *L. Grant Peeples, Director, State Beverage Department, Tallahassee*

#### QUESTIONS:

1. Where the population of an incorporated municipality in a wet county is less than 1251 persons, should such area be considered in determining the number of licenses to be issued in the rural area of the county?
2. If question 1 is answered in the affirmative, may a license be issued for a location within such incorporated municipality?

The circuit court of the 2nd judicial circuit, in and for Leon county, by its order of June 22, 1956, in the case of *State of Florida, ex rel George Edward Wood, trading as West Indies Lounge, as relator, and J. D. Williamson, as director of the beverage department of the state*, a proceeding in mandamus, identified as common law case 8264, answered question 1 in the affirmative. Although there was no appeal from the said order of the said circuit court, the principle seems to have received the approval of the supreme court in *State of Florida, ex rel village of North Palm Beach, a municipal corporation, v. H. G. Cochran, as director of the beverage department of the state*, Fla., 112 So. 2d 1. The license involved in the supreme court case had been issued under and pursuant to the order of the circuit court above mentioned to an area beyond the corporate limits of the village of North Palm Beach, but had been transferred by order of the beverage department to a location within the said municipality.

The proceeding in *Village of North Palm Beach v. Cochran*, supra, was for the purpose of determining the authority of the

beverage department to license a beverage retail store or place of business within an incorporated municipality having a population of less than 1251, within a wet county, over the objection of the said municipality. The court held that the beverage department was without authority to license a beverage store or place of business within a municipality, although in a wet county, having a population of less than 1251 persons, over the objection of the municipality. In *State v. Cochran*, supra, the court said that "the fact that the limitations of the statute, as we construe it, may operate the sale of liquor in some municipality having a population of less than 1251 persons, thereby creating dry areas in a wet county, would not seem to us to be violative of article XIX, Florida Constitution, the local option provision of the constitution . . . . It seems to us that the act of the respondent so affects the relator municipality and *all the citizens thereof* as to characterize it an act of public nature . . . . To the extent that the issuance of liquor licenses is authorized by the statute the municipality cannot complain of the issuance thereof for use within its boundaries, but the municipality *and all its citizens*, have a common public right to secure cancellation of the issuance of such a license for use within its boundaries where not authorized under the statute." In this same case the court said that the action of the beverage department "in authorizing the transfer of the license involved herein was violative of the subject statute and that such action should be rescinded." In the light of the said opinion doubtless an original issuance of a beverage license to a location within a municipality having a population of less than 1251 would likewise be illegal.

From the above and foregoing, question 1 is answered in the affirmative; and question 2 in the negative.

The question may arise as to the authority of the beverage department to issue such a license to a location within a municipality (in a wet county) having a population of less than 1251 *with the consent of the governing body of the municipality*; however, the court in *State v. Cochran*, states that the issuance of a license to a location within such a municipality "affects the relator municipality *and all the citizens thereof*," and that the "municipality, *and all its citizens*, have a common public right to secure cancellation of the issuance of such a license within its boundaries where not authorized under the statute." (Emphasis supplied.) It is doubted that the consent of the governing body of the municipality would be binding upon *all its citizens*, referred to by the court.

060-168—October 12, 1960

#### CRIMINAL PROCEDURE

WITNESSES—CONSTRUCTION OF §932.29, F. S.—APPLICABILITY TO WITNESSES SUBPOENAED TO TESTIFY OR PRODUCE BOOKS, ETC., BEFORE LEGISLATIVE COMMITTEE

To: *Richard E. Gerstein, State Attorney, Miami*

#### QUESTIONS:

1. In the event a witness testifies before Senator Kelly's committee, pursuant to a subpoena and produces books, papers or other documents also pursuant to a



subpoena, would he be immunized under the provision of §932.29, F. S.?

2. In the event the witness appears voluntarily following a request by the committee and without being subpoenaed and testifies, would he be immunized under §932.29?

Section 932.29, F. S., reads as follows:

*No person shall be excused from attending and testifying or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. (Emphasis supplied.)*

Said statute deals only with attending and testifying, or producing books, papers and other documents *before a court*, and it has no application to attending and testifying or producing books, papers, or other documents before a legislative committee, which is not a court.

As the statutes now stand, there is no provision for the immunization of witnesses testifying before legislative committees. The recognized way for a committee witness to avoid having self-incriminating testimony used against him in a subsequent prosecution is to exercise his right to refuse to give any such testimony before the committee on the ground that it might tend to incriminate him. In this connection, it would be appropriate for the chairman of the committee, or its attorney, to warn the witness of his privilege; if this is done, the witness will be in poor position to claim in a subsequent proceeding that he gave self-incriminating testimony in ignorance of his rights.

Accordingly, your questions are answered in the negative.

060-169—October 13, 1960

#### PUBLIC BUSINESS

BIDDING—PLEDGE OF PUBLIC CREDIT—CH. 230, F. S.; §10, ART. IX, STATE CONST.

To: Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee

#### QUESTION:

Does a bid submitted to a county board which bid contains the terms "... our terms are net EOM tenth, one per cent per month thereafter" come within the legal requirements for valid, firm and acceptable bids?

The terms set forth in the bid are in the nature of either a penalty or interest for an indefinite period. Whereas it is permissible for the state or one of its agencies to take advantage

of discounts for early or prompt payment, the payment of penalties or interest on accounts would be violative of §10, Art. IX, State Const. This provision of the constitution provides:

The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

It is the opinion of this office that a contract wherein the state or its agencies or subdivisions obligates itself to pay a fixed charge for an indefinite period over and above the bid price would pledge the credit of the state or its subdivision.

The county board would be derelict in its duties as enumerated in Ch. 230, F. S., if it entered into a contract containing such terms. Although such terms may be acceptable in private business, a public body may not enter into such a contract.

It is the opinion of this office, therefore, that this bid does not come within the requirements of a valid, firm, acceptable bid if the bid is submitted to the state or one of its agencies or subdivisions.

060-170—October 16, 1960

#### COUNTY ORGANIZATION

COUNTY BUDGET LAW—OVERSPENDING—JUSTICE OF THE PEACE, DUVAL COUNTY, CH. 21874, 1943—§6, ART. VIII, §10, ART. XVIII; §17.041, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Where office budgets established by the county budget commission for justices of the peace and constables, under Ch. 21874, 1943, are overspent, who is charged with the collection of such over-expenditure?

An examination of your file, handed us in connection with the request for opinion, including the state auditing department's audit report 5177, dated Aug. 4, 1960, of the audits of the books and records of the justices of the peace and constables of Duval county, reveals that office budgets were prepared, approved and adopted by the Duval county budget commission, under and pursuant to Ch. 21874, 1943, as amended, added to and extended by the legislature, for each of the justices of the peace and constables for Duval county for the periods covered by the said audits and audit reports. The several audits of said justices of the peace and constables having been consolidated into said audit report 5177. These audits and audit report show over-expenditures, by some such justices of the peace and constables, of their said office budgets.

Section 6, Art. VIII, State Const., seems to classify Constables as county officers, and §10, Art. XVIII of said constitution, seems to classify justices of the peace and constables as county officers. The word "board" as used in Ch. 21874, 1943, includes the officials of the county, under which budgets may be adopted and prescribed for the boards of the county (see §§5 and 9 of said Ch.

21874). Such budgets, when adopted and final, "shall be final and shall have the force and effect of fixed appropriations determined by authority of law which shall not be altered or amended by such board or officer or member thereof." It is unlawful for any such board (including justices of the peace and constables) "to expend or to contract for the expenditures for any purpose during the ensuing fiscal year of more than the total amount appropriated for any particular fund in and by the budget finally prepared and certified to such board . . . and his sureties shall be jointly and severally liable to the county for such excess to be recovered in an action at law brought for and in the name of the county by the county budget commission or any taxpayer." (Emphasis supplied.) (See §§9 and 15, Ch. 21874).

It is made unlawful for a county officer to transfer money from one fund in his budget to another "or to pay from one fund the expenditures legally payable from another fund," unless there is a proper transfer of funds concurred in by the county budget commission and approved by the state budget commission. (§16, Ch. 21874). The supreme court, in *Chase v. Board of Public Instr., Fla.*, 52 So. 2d 122, text 123, said, concerning said Ch. 21874, that "it is in no sense a local law, it is a general law applicable to counties within its class but potentially applicable to every county in the state." It is, therefore, a general and not a local or special law, and must be construed and treated as a general law.

Although it is provided in §§9 and 15 of said Ch. 21874, that suits to recover over-expenditures of budgeted funds thereunder are to be "brought, for and in the name of the county, by the county budget commission or any taxpayer," (emphasis supplied) no reference is made as to who is to represent the county or the county budget commission in such proceedings. In the absence of provision in the statutes and laws providing otherwise it may well be presumed that the attorney be furnished by the budget commission; however, Ch. 59-145, (§17.041, F. S.), also a general statute, must be considered in this connection and construed with said provisions in Ch. 21874. Said §17.041, makes it the duty of the state comptroller to adjust and settle, or cause to be adjusted and settled, all accounts and claims heretofore or hereafter certified to him by the state auditor against all county and district officers and employees, and other persons, firms and corporations, entrusted with, . . . or may be in anywise indebted to or accountable to a county or district for any property, funds or money . . . , and further provides that, on the failure of such officer or employee to adjust or settle such account "the comptroller shall direct the attorney for the board of county commissioners . . . entitled to such account, property, funds, moneys or other thing of value, to represent such county or district in enforcing settlement, payment or delivery of such account, property, funds, moneys or other things of value." (Emphasis supplied.) (§17.041 (1) and (2), F. S.). Subsection 3 provides the procedure when the county attorney is disqualified or otherwise unable to act.

Here we have two general statutes regulating the enforcement and collection of moneys and funds due and owing by county officers to the county, one (§§9 and 15, Ch. 21874) providing for enforcement by actions at law "brought in the name of the county by the county budget commission," without specifying the counsel to represent the said county and budget commission; the other, (§17.041, F. S.), providing that the "comptroller shall direct the

attorney for the board of county commissioners . . . to represent the county . . . in enforcing settlement, payment or delivery of such accounts, property, funds, money or other things of value." The mandate in §17.041, is not that the county attorney represent the board of county commissioners, but the county. There appears to be no conflict between said §§9 and 15, Ch. 21874, and §17.041, F. S.; the first regulates the bringing of the suit and the other the attorney to handle the litigation for the county. There was no constitutional prohibition against the legislature designating the county attorney as the attorney for the county budget commission in the enforcement of shortages in the accounts of officers in counties having budget commissions.

Answering the above stated question sums due the county by reason of over-expenditures of the county budget in Duval county are collectible in suits filed in the name of the county, by the county budget commission, represented by the county attorney.

060-171—October 11, 1960

### ELECTIONS

PRESIDENTIAL ELECTION—NATIONAL STATES RIGHTS PARTY—GOVERNOR ORVAL E. FAUBUS; RIGHT OF PRIVACY—§103.021, F. S.—§ 1, ART. II AND 12th AMENDMENT, U. S. CONST.

To: R. A. Gray, Secretary of State, Tallahassee

#### QUESTION:

May Governor Orval E. Faubus, of Little Rock, Ark., withdraw his name as a candidate for president of the U. S., as contained in those certain petitions heretofore filed under and pursuant to §103.021(3), F. S.?

For the purposes of this reply to your letter we shall presume that the petitions were sufficient in number and form to conform to the requirements of said §103.021, F. S. These petitions purport to be by Florida electors seeking the placing of the names of Governor Orval E. Faubus and Admiral John G. Crommelin, as candidates for president and vice-president of the U. S., on the general election ballot at the forthcoming general election.

The said petitions were filed pursuant to said §103.021(3), which provides that "*minor political parties*, which have not elected a president of the United States since January 1, 1900, may have the names of their candidates for president and vice president printed on the general election ballots," by the filing of the petitions therein described with the secretary of state of Florida. Although the names of the candidates for president and vice president are printed on the election ballot, they are not in fact the candidates to be elected at such general election, but the actual candidates are the presidential electors of the political party so nominating such candidates. See said §103.021, (1) and (2). Such presidential electors are provided for by §1, Art. II, and the 12th amendment, of the U. S. constitution. Under said §1, Art. II, "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled to in Congress." Section 103.021 is the method provided by the laws of Florida for the appointment of presidential electors under said §1, Art II, U. S. Const. The 12th amendment



provides the machinery for the selection of a president and vice-president by the said presidential electors.

We have before us a copy of the telegram from Gov. Faubus to you, and of the letter of Oct. 8, 1960 from him to you, from which telegram it appears that Gov. Faubus has "taken no interest in this matter and (is) not a candidate for President on any ticket," and by said letter and telegram specifically withdraws his name from the Florida ballot as a candidate for president. We must construe Gov. Faubus' telegram and letter as showing that he was no party to the inclusion of his name on the above-mentioned petitions filed with you, bearing his name as candidate for president, and that he does not want his name to appear upon the Florida ballots in such capacity. There is no evidence before us showing, or even indicating, that the selection of Gov. Faubus by the persons filing said petitions with you, or by any party group, was with his knowledge and consent, or that he has legally accepted such nomination or selection. These facts prevent the right of the election officials of Florida to enter Gov. Faubus' name on the ballots of Florida until and unless his consent is evidenced in some proper and legal manner, and especially against his consent. In short, Governor Faubus insists on his so-called rights of privacy.

The "right of privacy" has been defined as "the right of an individual to be left alone, to live a life of seclusion, or to be free from unwarranted publicity." (77 C. J. S. 396, §1). The Florida supreme court, in *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, text 248, recognized the doctrine of the right of privacy as "the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze." The question before us is not one of the dissemination of news, which may be an apparent exception to the rule of the right of privacy. The use of a person's name without his consent has often been held to be a violation of his right of privacy, when not used in the dissemination of news (77 C. J. S. 409-413, §5; 41 Am. Jur. 940 and 941, §21). Generally upon the right of privacy see annotation in 138 A. L. R. 22-110.

Of interest is *State ex rel La Follette v. Hinkle*, 131 Wash. 86, 229 P. 317, where the court recognized the right of a person to secure relief prohibiting state officers from certifying certain candidates for state offices under nominations made by a self-styled "La Follette State Party" where the use of his name in connection with the local state ticket was contrary to the wishes of the relator Robert M. La Follette, then the nominee of the Progressive Party, who charged that the use of his name, in connection with the so-called La Follette state party was contrary to his wishes and prejudicial to his candidacy as nominee of the said progressive party. In recognizing that the use of Mr. La Follette's name, in connection with the said La Follette state party designation, was a violation of his right of privacy, the court remarked that nothing so exclusively belongs to a man or is so personal and valuable to him as his name, inasmuch as his reputation and the character he has built up are inseparably connected with it. Upon the question of personal rights generally, and equitable jurisdiction to protect them, see annotation in 175 A. L. R. 440-523.

Due to the fact, as stated by Gov. Faubus in his correspondence with you, that he had taken no interest in the action of the

so-called national states rights party in obtaining and filing the petitions with you, and that he is not a candidate for president on any ticket, together with his direction that his name be withdrawn from the Florida ballot as a candidate for president, we do not think that the ballots to be used in the coming general election should carry his name. He is within his legal right when he demanded that his name be not so used. The use of his name might well be a violation of his right of privacy above discussed.

We next come to the question of the right of the candidate for vice-president to have his name printed on the ballot without being accompanied with the name of a candidate for president. The national states rights party is a minority party within the purview of the Florida election code so that it must conform to §103.021 (3), F. S., for its candidates to be listed on the general election ticket of this state. Said subsection makes no provision for the general election ballot to carry the name of either a candidate for president, or a candidate for vice-president, without the same being accompanied with the other. Said section 103.021 (2), provides for the entry of the names of the candidates for president and vice-president on the general election ticket, as representative of the group of presidential electors, *but not separately*. Presidential electors vote for both a president and a vice-president, and no provision is made for voting for one without the other. It is our considered opinion that said §103.021(3), makes provision for an instructed list of presidential electors, so that the failure of Gov. Faubus to accept what may be called a nomination, leaves a noncompliance with the requirements of §103.021(3) that there be both a candidate for president and a candidate for vice-president.

In your letter you point out: "In other words—in preparing the ballots we have considered the nominees for President and Vice President inseparable on the ballot. For example—it would be impossible on the Florida ballot to vote for Nixon for President and Johnson for Vice President, or to vote for either Lodge or Johnson and at the same time not vote for Nixon or Kennedy." Your analysis appears to accord with the statutes including those relating to presidential candidates of minority parties.

Construing said §103.021(3) as requiring an instructed slate of officers for president and vice-president in no way violates the requirements of the federal constitution (*Ray v. Blair*, 343 U. S. 214, 72 S. Ct. 654, 98 L. ed. 894), and a failure or absence of a candidate for president will not authorize the entry of only the candidate for vice-president's name on the ticket without that of a candidate for president.

The question posed by you, as to whether you should advise the county commissioners to place the name of the candidate for vice-president, without a candidate for president, for the national states rights party, is answered in the negative.

060-172—October 19, 1960

#### JUVENILES

CITY POLICE DEPARTMENT, INVESTIGATION BY—RECORD IDENTIFICATION—§39.03(6), F. S.

To: A. O. Folsom, Jr., Chief of Police, Daytona Beach

#### QUESTIONS:

1. Is the city police department of Daytona Beach,

authorized to retain in its files full names of juveniles involved in accidents and criminal cases?

2. If a statement is taken from an adult, which statement mentions a juvenile, may the name of such juvenile be kept in the files of the police department?

Section 39.03(6), F. S., provides, among other things, as follows:

... Any record of the child made by any law enforcement officer or other person except the officers and employees of the juvenile court shall be made in a separate record kept for that purpose, *identifying the child only by the initials and juvenile court case number of the child*; shall not be a public record; and shall not be open to inspection by anyone other than the officers and employees of the juvenile court and by the child, the parents or legal custodians of the child, and their attorneys. (Emphasis supplied.)

In view of the foregoing statute, questions 1 and 2 are answered in the negative. The juvenile may be identified by initial only and the juvenile court case number, provided a case is made.

060-173—October 20, 1960

#### STATE AGENCIES

TORT LIABILITY, IMMUNITY—UNIVERSITY OF SOUTH FLORIDA; BOARD OF CONTROL AND STATE BOARD OF EDUCATION

To: James Luther Hearn, Regional Counsel, Federal Housing and Home Finance Agency, Atlanta, Ga.

QUESTION:

Is the university of South Florida located at Tampa, liable for damages in tort?

The university of South Florida is a state agency under the direction of the state board of control and state board of education. A state agency is not liable for tort (*Arundel Corp. v. Griffin*, 103 So. 422).

Your question is answered in the negative.

060-174—October 26, 1960

#### GOVERNMENT OFFICERS AND EMPLOYEES

PUBLIC CONTRACTS—FINANCIAL INTEREST OF GOVERNMENT OFFICERS AND EMPLOYEES PROHIBITED—COUNTY SCHOOL BOARD—§230.23(10) (i)

To: Bryant Willis, State Auditor, Tallahassee

QUESTION:

Is it lawful or proper for a member of a county board of public instruction to be a subcontractor for the general contractor for the construction of a school building, for the board for which he is a member?

Section 230.23 (10) (i), F. S., provides:

*Contracts for materials, supplies, and services.—Contract for materials, supplies, and services needed for the county school system; provided, that no contract for*

supplying these needs shall be made with any member of the county board, with the superintendent, or with any trustee in the county, or with any business organization in which any county board member, the county superintendent, or any trustee has any financial interest whatsoever, except that any trustee may submit sealed competitive bids and be awarded a contract as provided by law for the lowest and best bid.

In my opinion the intent of the legislature in enacting the above quoted act was to avoid in so far as possible any conflict of interests on the part of school board members in carrying out their duties to contract for the purchase of necessary materials, supplies and services. This would include the letting of contracts for the construction of buildings.

Although a subcontractor does not contract directly with the school board, I believe that the language used in the act "... any financial interest whatever. . ." is so broad as to extend to a subcontractor who undoubtedly has considerable interest in the financial success of the contractor on the project in which he has obligated himself as a subcontractor.

Good public policy is of paramount importance in the discretionary authority given school board members by law in the award of contracts involving the expenditure of school funds and it is apparent that if board members were permitted, in effect, to contract with the board indirectly as subcontractors through the device of a "middleman" serving ostensibly as the contractor, the system might easily lend itself to the kind of undue influence and bad public policy which the legislature has sought to avoid.

"A municipal officer may not take advantage of his position for private gain." (23 So. 2d 835). The supreme court of California has held a contract with the city to be void even though the city commissioner who was a party to letting it held only the position of foreman with the other contracting party (Stockton Plumb. & Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020).

In my opinion, public officials, including county school board members, even though their motives may be above reproach, should, if for no other reason, for their own protection avoid contractual relationships on behalf of the board by which they might easily benefit personally. Even though there may not be a specific prohibition in the school code against board members entering into subcontracts with prime contractors engaged in doing construction or furnishing supplies to the board, I believe that for the reasons given above your question as stated must be answered in the negative.

060-175—October 27, 1960

#### COURTS

JUVENILE COURT—JURISDICTION—CH. 39, §§39.01(6),(11);  
39.02(1),(3),(6), F. S.

To: *W. L. Wadsworth, Bunnell*

#### QUESTION:

Based upon the following statement of fact, can the juvenile court in county No. 2 usurp jurisdiction over juveniles residing in county No. 2, for alleged crimes committed in county No. 1, prior to any preliminary pro-



cedure before courts of the county No. 1 where crime was committed?

STATEMENT OF FACT:

Minors, along with two adults, have had warrants issued against them on the allegation that they killed and carried away a cow in county No. 1 on or about April 26, 1960; said warrant was mailed to county No. 2 and was served on said minors on June 20, 1960. Before a hearing could be held before the committing magistrate in county No. 1, a petition was filed in county No. 2, before the juvenile court, alleging the juveniles' complicity in the matter, and a hearing was held on June 13, 1960. At least one of the minors, and possibly both of them, have been under the juvenile court's supervision in county No. 2.

The answer to your question is to be found in Ch. 39, F. S., which deals with juvenile courts and their jurisdiction over dependent and delinquent children. For the purposes of that chapter, the word "child" is defined by §39.01(6), as follows:

(6) "Child" means any married or unmarried person under the age of seventeen years, or any person who is charged with a violation of law occurring prior to the time that person reached the age of seventeen years. Section 39.01(11) provides in part as follows:

(11) "Delinquent child" means a child who commits a violation of law, regardless of where the violation occurred; . . . .

The first paragraph of §39.02(1) and (2) read as follows: 39.02 Jurisdiction.—

(1) The juvenile court shall have exclusive original jurisdiction of dependent and delinquent children domiciled, living or found within the county or district in which the court is established. The juvenile court of the county or district in which the child is found shall assume jurisdiction of the child, which jurisdiction shall be exclusive *unless the judge thereof*, upon approval of the judge of the juvenile court of the county or district in which is located the domicile or usual residence of the child, *shall transfer the case and child to the latter court*, before or after hearing, in which event the latter court shall thereafter exercise exclusive jurisdiction. (Emphasis supplied.)

\* \* \*

(2) All proceedings against a child for alleged violation of law must be brought in the juvenile court, except as provided in subsection (6) of this section.

Section 39.02(6) specifies the circumstances under which jurisdiction of a child brought into a juvenile court as a delinquent child may be transferred by the juvenile court to the court which would have jurisdiction if the child were an adult.

Since the juvenile court of county No. 2 has assumed and apparently still exercises jurisdiction over the two minors, I shall assume for the purposes of this opinion (1) that each of said minors was under the age of 17 years at the time the offense was allegedly committed by them and is therefore a "child" within the foregoing definition of that word; (2) that the warrants issued

against said minors in county No. 1 were issued as a step in an ordinary criminal prosecution against said minors; and (3) that the juvenile court has not transferred jurisdiction to the committing magistrate pursuant to §36.02(6).

If these assumptions of fact are correct, then the above quoted first paragraph of subsection (1), and subsection (2), of §39.02 vest exclusive original jurisdiction in the juvenile court, with the result that the committing magistrate has no criminal jurisdiction over the two minors.

In conclusion, I call attention to the following provisions of §39.02(3):

(3) If during the pendency of any criminal charge in any other court of the state of Florida or of any city or town therein, against any person presumed to be an adult, it shall be ascertained that the person is a child, or was a child at the time the offense was committed, that court shall forthwith transfer the case, together with the physical custody of the child and all physical evidence, papers, documents, and testimony, original and duplicate, connected therewith, to the appropriate juvenile court; provided, that this shall not apply to any case certified to that court by the juvenile court judge as provided in subsection (6) of this section. . . .

However, I doubt that anything would be accomplished by a transfer by the committing magistrate to the juvenile court under said subsection (3) because the juvenile court has already assumed jurisdiction. Under the circumstances, it would probably be more practical for the magistrate to dismiss the criminal case against the minors.

060-176—October 28, 1960

#### TAXATION

DOCUMENTARY STAMP TAXES—STAMPING ORIGINAL, COPY—§§201.04, 201.05, 201.08, 201.09, 201.11 AND 201.19; CH. 201, F.S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where original documents subject to taxation under §201.08, F. S., are to be transmitted to and maintained in other states, by the owner or holder thereof, may a copy thereof, in lieu of such original, be stamped and maintained in this state with the consent of the state comptroller?

Although some sections of Ch. 201, F. S., specifically direct the stamping of the taxable documents and the placing of the stamps (see §§201.04, 201.05, and 201.09, F. S.), we find nothing in §201.08 requiring that the required stamps be placed on the original document. On examination of §201.09, F. S., relating to the taxation of renewal promissory notes, we find that renewal notes, as therein defined, do not require stamps when "such renewal note has attached to it the original promissory note with cancelled stamps affixed *thereon* showing full payment of the taxes due *thereon*." Here for the maker to receive credit for taxes paid on the original promissory note the stamps must be affixed to the original note. Section 201.19, F. S., seems to be subject to construction as requiring the placing of documentary stamps on the

original notes in that it refers to stamps that have "been removed from any vellum, parchment, paper, instrument, writing or document."

It is specifically provided that "no documentary stamps shall be required to be attached to instruments under the provisions of" §201.08(2), F. S., which subsection seems to relate to written obligations made in connection with sales made under retail charge account services, incident to sales which are not conditional in character and which are not secured by mortgage or other pledge of the purchaser. The tax imposed is "for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections, or for and in respect of the vellum, parchment, or paper upon which . . . written or printed . . ."

As to written obligations to pay money, including the documents mentioned in §201.08, F. S., the documentary stamp tax is an excise tax on the promise to pay (*Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, text 416). Federal tax regulation 43.4374-1, relative to documentary stamp taxes, seems to contemplate the stamping of the original documents and subsequent instruments where the original obligation is increased thereby. However, the U. S. is not confronted with instruments maintained beyond its borders as is the state under the circumstances mentioned in the above question.

Except in those instances where the statutes specifically require the stamping of the original instrument we see no reason why, under suitable rules and regulations made and promulgated by the state comptroller pursuant to §201.11, F. S., the stamps might not be placed on true and correct copies of the original maintained in this state where the original is kept and maintained in other states. Such rules and regulations should, for the benefit of the states wherein such original documents are maintained, require the making of memoranda on the original documents evidencing the stamping of copies in this state in lieu of the originals maintained in the other states.

The above question is answered in the affirmative, subject to the limitations above mentioned.

060-177—October 28, 1960

#### TAXATION

CLERKS' CERTIFICATES OF TITLE—STAMP TAXES; LIABILITY AND PAYMENT—CH. 201; §§702.02 AND 201.01, 201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTIONS:

1. Should stamp taxes on clerk's certificates of title be paid by the purchaser in addition to the purchase price?

2. Should the clerks' certificates of title be issued prior to the payment of the stamp taxes thereon?

This office by its opinion of Aug. 19, 1953 (053-207; 1953-4 A.G.O. 267) held that clerks' certificates of title made and issued pursuant to §702.02, F. S., are subject to taxation under §201.02,

F. S., but made no attempt there to determine liability for the payment of such taxes. Section 201.01, F. S., imposes documentary stamp taxes upon the persons, firms and corporations "*who make, sign, execute, issue, sell, remove, consign, assign or ship the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state,*" (emphasis supplied) the documents, instruments, etc., mentioned in subsequent sections of Ch. 201, F. S. This statute was patterned after and taken from the federal revenue act of 1924, §800 of which contained language identical with that above quoted from the Florida Statutes. This substantial identity between the Florida and the federal acts existed until the adoption of the 1939 federal revenue code. Such Florida statute, having been taken from a substantially identical federal one, takes the same construction in the Florida courts as its prototype was given in the federal courts, in so far as such construction is not inharmonious with the spirit and policy of our own legislation upon the subject (*State v. Cook*, 108 Fla. 157, 146 So. 223, text 224; *Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22, text 23).

The federal courts have held that the phrase "who makes, signs, executes, issues, sells, removes, consigns, assigns or ships the same," refers primarily to the maker of the instrument, while the phrase "for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped," has reference primarily to the grantee or vendee of the instrument (*Endler v. U. S.*, DC NY, 110 Fed. Supp. 946, text 948; *Crawford v. New South Farm and Home Co.*, DC Fla., 231 Fed. 999, text 1000; *Home Title Ins. Co. v. Keith*, DC NY., 230 Fed. 905, text 907; *Farmers' Loan & Trust Co. v. Council Bluffs Gas and Electric Light Co.*, DC Iowa, 90 Fed. 806; *Granby Mercantile Co. v. Webster*, CC SC., 98 Fed. 604, text 606; 47 C. J. S. 784, §545, notes 7 and 8). The following state authorities seem to support the same rule, as do the federal courts (*Adams v. Dale*, 29 Ind. 273; *Myers v. Smith*, 48 Barb. (NY) 614; *Britenbarker v. Hatler*, 24 Pa. Co., 585; *Voight v. McKaim*, 2 Pittsb. Pa. 522; *Peoples National Bank v. Baker*, 30 Pa. Dist. & Co. 679).

In *Farmers' Loan and Trust Co. v. Council Bluffs Gas & Electric Light Co.*, supra; *Crawford v. New South Farm and Home Co.*, supra; and *Home Title Ins. Co. v. Keith*, supra, the court held federal stamp taxes to be a part of the costs and expenses of the litigation, payable from the proceeds of the foreclosure sales and funds otherwise in the hands of the master or receiver. In one of the cases the court compared the federal tax stamp expenses to the postal stamp expense incurred by the master or receiver in mailing of notices required in connection with the litigation. Both the postal statutes and the federal documentary stamp taxing statutes must be complied with.

In the light of the above mentioned federal and other authorities, we construe the Florida Statutes as imposing the tax upon those for whose benefit the conveyance was made, as well as upon the persons making the conveyance. It, therefore, appears to be the primary duty of the person, firm or corporation making the conveyance to pay the tax, and in the absence of payment by the maker it becomes the secondary duty of the vendee or grantee to pay the same. The tax obligation arises upon the making of the conveyance. The tax, being a part of the costs of litigation, may be paid from



any available funds derived from the litigation in the same manner as costs and expenses of the litigation. Unless otherwise directed by the court, the clerk should pay the stamp taxes on the certificate of title from the proceeds of the sale of the property, treating the same as a part of the costs. The clerk's certificate of title should not be issued prior to the payment of the stamp taxes thereon, unless directed by the court. The clerk, in making the sale of the property and issuing the certificate of title, acts in the nature of a master under the direction of the court and would appear to be authorized to seek instructions of the court in that connection.

060-178—November 1, 1960

#### RETIREMENT

#### POLICE RETIREMENT FUND—DEPOSIT ADMINISTRATION CONTRACTS—§185.06; CH. 185, F. S.

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

#### QUESTION:

Under the provisions of §185.06, F. S., may the assets of a police officers retirement fund be placed with an insurance company under a "deposit administration contract"?

Section 185.06 (1), F. S., authorizes and empowers the board of trustees of police officers retirement fund, created pursuant to Ch. 185, to invest the assets of such fund ". . . in annuity and life insurance contracts of life insurance companies in amounts sufficient to provide, in whole or in part, the benefits to which all of the participants in the police officers retirement fund shall be entitled under the provisions of this chapter, and pay the initial and subsequent premiums thereon."

Section 185.06 (2), et seq., authorizes the trustees of a police officers retirement fund to *invest the assets of such fund in time or savings accounts of certain banks or in savings and loan associations, obligations of the U. S. or obligations guaranteed as to principal and interest by the U. S., county and municipal bonds within certain designated limitations.*

Section 185.06 (8) charges the trustees of the police officers retirement fund with the general administration and the responsibility for the proper operation of the retirement fund.

You advise that the trustees of several such retirement funds contemplate entering into contracts with insurance companies whereby the assets of the retirement fund will be deposited with and be administered by the insurance company for a certain designated period or until such time as it becomes necessary because of retiring officers covered by the fund, to purchase life insurance or annuity contracts for such retirees. You further advise that under these contracts the assets of the fund will be commingled with the general assets of the insurance company and will be invested and used as general assets of the insurance company.

The legislature has authorized the trustees of the police officers retirement fund to make certain limited investments of fund assets and in addition to *purchase life insurance and annuity contracts with life insurance companies.* Thus, as to the investment of such assets, the discretion of the trustees would appear limited to investment programs authorized by statute.

The clear, succinct, unequivocal language of the sections of Ch. 185 authorizing investment of retirement fund assets by the trustees leaves no room for construction because said language admits of but one meaning. Hence, there is doubt that the courts would disturb the language of the statute (See *Hooper v. State Road Dept.*, 105 So. 2d 515; *State ex rel Florida Jai Alai, Inc. v. State Racing Commission*, 112 So. 2d 825).

There is a vast distinction between annuity and life insurance contracts and other types of contracts between the fund trustees and an insurance company for the administration of the trustee assets of the fund. In connection with the former actuarial factors and the establishment of proper reserve funds provide substantial assurance and protection that the provisions of the annuity or life insurance contracts will be fulfilled. Such protective features do not generally obtain in all contracts to which life insurance companies are parties.

It is my opinion that the trustees of a police officers retirement fund, established pursuant to the provisions of Ch. 185, F. S., are without authority to deposit or invest assets of such fund with an insurance company under what is commonly understood to be a "deposit administration contract."

060-179—November 2, 1960

#### STATE WELFARE AND HEALTH

RULE-MAKING POWER OF STATE WELFARE DEPARTMENT; DEFINITION OF "ACUTELY ILL" OR "INJURED PERSON"; CH. 401; §§401.01, 401.161, 401.02, 409.02, F. S.

To: *Davisson F. Dunlap, Attorney, State Department of Public Welfare, Jacksonville*

#### QUESTION:

In view of the provision of Ch. 401, F. S., does the Florida state department of public welfare have the authority to adopt a rule and regulation which will define the words "acutely ill" or "injured person" to include all patients the acute or urgent nature of whose illness or injury is such that it will respond to short term remedial treatment, the postponement of which would constitute a serious hazard to that patient's life or health?

Section 401.01, F. S., relating to hospital service for the indigent provides as follows:

There is hereby created a service to be administered by the state board of health to be known as "hospital service for the indigent," the purpose of which is to provide hospitalization for *medically indigent persons of this state*. the hospital charges to be limited to the nonprofit basic cost of the hospitalization. Such service is to be designed for the purpose of furnishing bed, board, and any hospital services needed for the *effective treatment of the acutely ill or injured indigent as deemed necessary and ordered by the physician in charge of the case*. (Emphasis supplied).

Section 401.02, F. S., defines a "medically indigent person" as "a person in this state who is acutely ill or injured, who can be helped markedly by treatment in a hospital and who is unable to

provide himself with necessary hospital services as prescribed and ordered by a physician."

To carry out the provisions of Ch. 401, F. S., the state welfare board is authorized in §401.161(1) to do, among other things, the following:

(a) Acting by and through the state welfare board, *enter* into such agreements with the state board of health and any agency of the federal government and accept such duties in respect to social welfare or public aid as may be necessary to qualify for federal aid for assistance to public assistance recipients under this chapter;

(b) Acting by and through the state board of public welfare employ such staff and *prescribe such rules and regulations* as may be necessary to meet the requirements of federal legislation, rules, regulations or enactments not inconsistent with the constitution and laws of this state. (Emphasis supplied.)

Further indication of legislative approval for the department having the authority to adopt necessary rules and regulations is found in §409.02, F. S., which authorizes the department to "prescribe such rules and regulations as may be necessary to meet the requirements of federal legislation, rules, regulations or enactments not inconsistent with the constitution and laws of this state; and take such action as may be necessary to secure the benefits of any public aid or assistance of any character as may be available from the federal government or any agency thereof which is not inconsistent with the constitution and laws of this state . . ."

In view of the foregoing, it appears that the state department of public welfare may adopt a rule and regulation defining the words "acutely ill or injured."

However, in view of the cooperation that should exist between the welfare department and the state board of health, I have taken the liberty of obtaining the comments of Dr. Wilson Sowder, state health officer, relative to the wording of the definition as proposed by the welfare department. In view of his concern for the treatment of cancer patients, he suggests in substance the following definition: "The words '*acutely ill*' or '*injured persons*' shall include all persons with an urgent short term illness, who *may* respond to short term remedial treatment, the postponement of which *may* constitute a hazard to the patient's life or health; that all persons with cancer shall be considered as having an urgent short term illness for purposes of eligibility for hospitalization, except those in the terminal stages of the disease."

His reason for suggesting a change of the word "will" to "may" is to preclude the possibility of hospitals being required in the future to produce evidence that the patient was improved by treatment, which would be impossible in the case of patients who died.

It is my opinion that the foregoing definition would be a considerable improvement as it more clearly defines what persons shall be considered acutely ill or injured for the purposes of hospitalization under Ch. 401, F. S., especially as it affects cancer patients.

060-181—November 9, 1960

**REGULATION OF TRADE, COMMERCE & INVESTMENTS  
RETAIL INSTALLMENT SALES—CONSTRUCTION OF  
§520.34(4), F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

**QUESTION:**

**Is the interest limitation of "ten dollars per hundred dollars per year," provided by §520.34(4), F. S., applicable to retail installment contracts having a large, or balloon type final installment or payment?**

As used here a balloon note or installment is a last payment under a note or contract much in excess of the regular monthly or other periodic payments provided. Such construction is in accord with the definition of a balloon mortgage contained in §697.05(2), F. S. As used in §520.30, et seq., F. S., a "retail installment contract" is an instrument reflecting one or more *retail installment transactions* entered into in this state pursuant to which goods or services may be paid for in installments, (§520.31(7), F. S.), and a retail installment transaction is the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract (said §520.31(6).) Contract payments are not required to all be equal in amount in order to be an installment contract (21 Words and Phrases 652-654, and supplement); which rule seems to be recognized by said §520.34(4), F. S., when it refers to contracts "payable other than in successive monthly payments substantially equal in amount."

The provision in said §520.34(4), that the interest on retail installment contracts within the purview of Ch. 520, F. S., shall not exceed, "on the principal balance, ten dollars per one hundred dollars per year," is in the nature of an interest statute, which being in derogation of the common law is strictly construed and should be restricted in construction to the recited instances (see 47 C. J. S. 17, §5). Doubtless the statute was adopted as a regulation for the protection of the purchasing public and to prevent fraud. This being true said §520.34(4), F. S., should be construed in that light.

Unless the final, although balloon, installment be taken and considered as being a part of the retail installment contract, it must be considered as another contract for the payment of money not in installments and subject to the interest and usury provisions of Ch. 687, F. S. The statute in providing the payment of interest on installment contracts within the purview of Ch. 520, F. S., fixed a limit on the interest that may be demanded thereon when the payments are in successive monthly payments substantially equal in amount, with the provision that the same rule is effective where the payments are on other than successive monthly payments substantially equal in amount, "having due regard to the schedule of payments." We find nothing in connection with the balloon or irregular last payment, with regard to bookkeeping, maintaining of records, collection, or otherwise, which may be said to increase the trouble and expenses of the retailer in keeping and maintaining his books and records or in connection with collection and enforcement. We find nothing in the statute which may be taken as permitting an increase in the interest rate because the last payment is larger than the regular ones, or a balloon payment.



The above question is answered in the affirmative, it being our view that the phrase "having due regard to the schedule of payments" is not sufficient to authorize an increase in the interest rate beyond the 10% mentioned.

060-182—November 15, 1960

#### TAXATION

SPECIAL TAX DISTRICT—PROCEDURE FOR LEVY AND COLLECTION—ENGLEWOOD WATER DISTRICT—CH. 59-931; §192.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where there is a failure to levy the ad valorem taxes required to be levied and collected by a special taxing district, may the same be levied and assessed after the completion of the county tax rolls for the tax year?

We are here specifically concerned with the Englewood water district, located in Charlotte and Sarasota counties, and established by Ch. 59-931. The purpose of this act was to establish water and sewer systems for the residents of the area described in the act and incorporated as the Englewood water district. The said act provided for the financing of the water and sewer system by the issuance of bonds and revenue certificates, payable in part from ad valorem taxes and in part from revenues derived from the operation of the district. One of the powers of the district, through its board of supervisors, is "to levy and assess ad valorem taxes without limitation of rate or amount on all taxable property within said district for the purpose of paying principal and interest on any general obligation bonds which may be issued pursuant to this act, and to pay the cost of operation and maintenance of such water system and sewer system and administrative expenses of the district, within the limitations and restrictions hereinafter provided." (§4(d) of said Ch. 59-931). Under section 10 of said Ch. 59-931, the district is "authorized to provide by resolution from time to time for the issuance of general obligation bonds pledging the full faith and credit of the district for the payment thereof . . . ." We are not advised what, if any, general obligation bonds pledging the full faith and credit of the district have been issued.

Section 11 of said Ch. 59-931, provides for the levy and collection of annual taxes on the property of the district, such tax levies and assessments to be "certified by the (district) board to the tax assessors of each of the counties of Charlotte and Sarasota, Florida, who shall be *ex-officio* tax assessors for the portions of the district lying and situate within the boundaries of each of the respective counties and such taxes shall be levied and collected in the same manner as other general county taxes." When collected such taxes are payable to the water district by the county tax collector. Section 22 of said chapter authorizes ad valorem taxes for the purpose of paying other expenses, referred to as maintenance taxes; to be assessed and collected as provided in said §11 above. These taxes appear to be levied by the district board, not the board of county

commissioners, to be certified by the district board to the county tax assessors, such county tax assessor, as well as the county tax collector, being referred to in said chapter as ex officio district officers. Although the district taxes are assessed and collected by the county taxing officers acting as ex officio district officers, and are a separate tax, we find nothing in the act prohibiting the use of the county tax roll for the purpose of assessing the district taxes, so long as the amount of the tax may be separately ascertained.

This is indicated by the opinion in *State v. Sloan*, 135 Fla. 179, 184 So. 781, where it was said that the drainage taxes therein mentioned were separate and distinct taxes from the state and county taxes, although both were assessed on the same tax roll. In this case the better practice was indicated to be the issuance of separate tax sale certificates when the tax was not paid. The resolution by the district board, which appears from the file to have been made in May of the tax year, had it been served on the tax assessors, would appear to have been sufficient as a certificate although in form of a resolution. The defect appears to have been in the district board's failure to serve the same on the tax assessor.

We are not advised whether or not general obligation bonds have been issued requiring the levy and assessment of ad valorem taxes for the payment thereof, and if so, whether the bond contract requires the levy and collection of taxes for the current year for such purpose. If the bond contract, if any, requires the levy and collection of ad valorem taxes in the 1960 tax year it is doubted that the failure of the district or county officers to require the making of such levies and assessments, or to make such levies and assessments, would excuse the making thereof. Where there is such a failure to make the required assessments mandamus may be resorted to to require either a current assessment for the present year or a back assessment on the next year's tax roll. The levy and collection of such taxes would seem to be a continuing duty which might be enforced by a proceeding in mandamus by any person adversely affected by the failure of the required assessment. We feel that there has been an omission by the taxing officials to make the required assessment within the purview of §192.21, F. S., which "may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place."

The above question is, therefore, answered in the affirmative, provided that any requirement herein mentioned be conformed to.

060-183—November 16, 1960

#### TAXATION

EXEMPTION, FARM AND GROVE PRODUCTS—CONSTRUCTION OF §205.17, F. S.—PRODUCTION OF LAWN GRASS; SODDING OF LAWNS

To: *John D. Steele, Attorney for Town of Davie, Hallandale*

#### QUESTIONS:

1. Are persons engaged in the production and sale of lawn and like tame grasses for sale to the buying public farmers within the purview of §205.17, F. S.?

2. Are persons engaged in the sodding of lawns and

like areas with tame grasses, produced by them, within the purview of §205.17, F. S.?

Section 205.17, F. S., provides that "all farm and grove products and products manufactured therefrom, except intoxicating liquors, wine, or beer, shall be exempt from all forms of license tax, state, county and municipal, when the same is being offered for sale or sold by the farmer or grower producing the said products. . . ." The supreme court, in *Johns v. Weeks*, 140 Fla. 141, 191 So. 187, text 188, took "knowledge of a consistent policy on the part of the legislature for years to exempt the producers of farm and grove products from all forms of license tax to dispose of what he produces." This tax exemption is limited to those sales by farmers, by themselves or through agents, of farm and grove products produced by them, and does not extend to farm or grove products procured by them from others for resale. This brings us to the question of whether the production of lawn and similar tame grasses, for sale to the buying public, is to be classified as "farming" and the producer thereof as "farmers."

The term "farming" seems to be included within the term "agriculture," the latter term being broader than the former (Fla. Industrial Comm. v. Growers' Equip. Co., 152 Fla. 595, 12 So. 2d 889, text 894). A "farm" has been defined as a tract of land devoted to the raising of crops and animals (16 Words and Phrases, 390, et seq.). A "farmer" has been defined as a person engaged in the business of cultivating land and employing it for the purpose of husbandry, and as a person engaged in tilling the soil (16 Words and Phrases, 420 et seq.). "While there are many kinds of farmers and a particular definition may not fit every case, the term does imply that farming is the *chief*, even though not necessarily the only occupation of the person." (Emphasis supplied.) (35 C. J. S. 956). Gardening, horticulture, and raising trees, shrubs and plants, under certain circumstances, have been held to be farming (35 C. J. S. 956; 35 C. J. S. 423). However, the operation of a commercial greenhouse and nursery has been held not to constitute farming (*Dye v. McIntyre Floral Co.*, 176 Tenn. 527, 144 S. W. 2d 752).

The term "farm product" seems to include grains, hays, cotton, fruits, vegetables, cattle, horses, poultry and other livestock, and other products of the soil usually produced by farmers (16 Words and Phrases, 442 et seq.). There would seem to be little, if any, legal difference between the production of grains, hays, cotton, fruits, vegetables, etc., by a person for the purpose of procuring a livelihood, and the production of lawn and other tame grasses for the same purpose. Such grasses may be classified as a farm product, *in so far as the production and sale of the same is concerned*, so long as such production and sale is the primary business of the person so engaged. Like the growing of peanuts, cotton, etc., the growing of such grasses, is clearly farming, but when such peanuts are subjected to manufacture into numerous peanut products, or such cotton is subject to manufacture in numerous cotton products, such manufacturing process goes beyond farming and becomes the primary purpose and the production of the farm products the secondary purpose. A person engaged in the production of farm products is a farmer when and only when farming is his primary business.

These observations seem to lead to the conclusion that a person is engaged in farming when his primary business is the production

of lawn and similar grasses for sale in its natural or sod form as such, and within the purview of §205.17, F. S.; however, should such a person engage to sod a parcel of land with such grasses produced by him, or otherwise deal with such grasses as other than a farm product held for sale, he would not be engaged in farming but in another business, profession or occupation. These observations seem to answer question 1 in the affirmative and question 2 in the negative.

060-184—November 16, 1960

### TAXATION

#### ZONING OF LANDS FOR AGRICULTURAL PURPOSES—CONSTRUCTION OF §193.201, F. S.—DUTIES OF BOARDS OF COUNTY COMMISSIONERS; TAX ASSESSORS

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**What are the respective duties of the board of county commissioners and the county assessor of taxes in the enforcement of §193.201, F. S.?**

Said §193.201, F. S., was derived from Ch. 59-226 and relates to the zoning of lands used exclusively for agricultural purposes for purposes of taxation. The preamble of the act declares that "the recent real estate development has tended to increase assessments on farm and agricultural lands and other agricultural products to unreasonable and unprofitable proportions, thus forcing many persons to give up their livelihood because of being taxed out of existence." The body of the statute authorizes and empowers boards of county commissioners in their "discretion to zone areas in the county exclusively used for agricultural purposes as agricultural lands; provided said lands have been used exclusively for agricultural purposes for five years prior to such zoning." The statute further provides that "in the event that the board of county commissioners zone said lands . . . the board shall notify the tax assessor on or before November first and the tax assessor shall immediately after the first day of January of the succeeding year . . . prepare and certify to the board of county commissioners a list of lands in the county so zoned as agricultural lands." (Emphasis supplied.)

Upon receipt of the report from the tax assessor "the board of county commissioners shall examine said list and classification of such lands submitted by the tax assessor and shall make such reclassification as shall be appropriate or justified, and as reclassified shall zone such lands in the county for tax purposes only as agricultural." (Emphasis supplied.) When so zoned the tax assessor is required to consider "no factors other than those relative to such use," defined in the statute as "the cost of the property as agricultural land, the present replacement value of improvements thereon, quantity and size of the property, the condition of said property, the present cash value of said property as agricultural land, the location of said property, the character of the area or place in which said property is located and such other agricultural factors as may from time to time become applicable. Such zoning restrictions are to be removed by the board of county commissioners when such



lands are used for any purpose other than agricultural. Lands are deemed agricultural lands when used for horticultural, floricultural, viticultural, forestry, dairy, livestock, poultry, bee or other farm purposes.

The statutes make the zoning of agricultural lands the duty of the *board of county commissioners* and not that of the tax assessor; however, after an area is zoned as agricultural lands it becomes the duty of the tax assessor to list the lands in such area for purposes of tax assessment and furnish the board of county commissioners with a copy of such listing for their review and correction. When this list is finally approved by the board of county commissioners and returned to the tax assessor he enters such lands on his tax roll as agricultural lands and enters the value thereof on said tax roll in accordance with §193.201(5), F. S.

Zoning has been said to be regulated by districts or areas; that is, districting (*Van Auken v. Kimmey*, 141 Misc. 117, 252 N. Y. S. 333, text 345; *Smith v. Collison*, Cal., 6 P. 2d 277, text 278; *Opinion of Justices*, 124 Me. 501, 128 A. 181, text 184; *Kimball v. Blanchard*, 90 N. H. 298, 7 A. 2d 394, text 395; 45 Words and Phrases 668 and supplement; 58 Am. Jur. 940-941, §1; 101 C. J. S. 660, et seq., §1). Few, if any, counties, are now entirely agricultural, but have within their boundaries municipalities and other areas engaged in pursuits other than agricultural. The areas or districts subject to zoning as agricultural lands are those where farming and agriculture is the main pursuit; such areas are the so-called farming or agricultural areas of a county. The intent and purpose of said §193.201, F. S., is to classify, for purposes of ad valorem taxation, those areas where farming and agriculture are the predominant business or trade and have been so for at least five years. This does not mean that each farm must have been farmed by the same person for five years or more, but that the area has been devoted to farming and other agricultural pursuits for five years or more.

Under §193.201, F. S., the boards of county commissioners, not the county assessor of taxes, are authorized to determine those areas in the county, if any, where farming and agriculture have been the predominant business for five years or more, and zone such areas for purposes of ad valorem taxation. It is the duty of the county assessor of taxes, once the area has been zoned by the county board, to enter the farms on the tax roll and value the same for purposes of taxation in accordance with said §193.201(5), F. S. An order by the county board zoning and classifying "all areas in . . . county exclusively used for agricultural purposes as agricultural lands," would not seem to be a compliance with the statute, in that, it does not separate the farming and agricultural areas from other areas of the county. Although the statute does not require a description of the farming or agricultural areas as are required in deeds of conveyances, such description as will permit the tax assessor to locate the area is required. In making such description water courses, railroads, highways, and similar may be used, as well as section and township lines.

It is the duty of the boards of county commissioners when they elect to come under §193.201, F. S., to specify the particular areas coming within the purview of said section, and furnish the county assessor of taxes with descriptions of such areas, who, upon the receipt thereof, proceeds to review or examine the area and assess all farms, that have been used for purposes of agriculture, as

defined in the section, for five years or more, furnishing the county board with a copy of his tentative descriptions and valuations, which, upon review by the board, must be returned to the assessor of taxes with such changes as may have been made by the county board. When returned to the assessor these lists form the basis for the tentative assessments.

These observations show the respective duties and obligations of the county board and the assessor of taxes.

060-185—November 16, 1960

#### WORKMEN'S COMPENSATION

LIABILITY OF EMPLOYER FOR TRANSPORTATION OF PROSPECTIVE EMPLOYEES (MIGRATORY LABORERS) TO PROSPECTIVE PLACE OF EMPLOYMENT—CH. 440, §440.02-(2)(a), F. S.

To: *Burnis Coleman, General Counsel, Industrial Commission, Tallahassee*

#### QUESTIONS:

Would a prospective employer be liable for injury to migratory farm workers occurring during the course of transportation of such workers to the place of employment where:

1. The recruitment of workers is on a purely voluntary basis through the facilities of the Florida state employment service, pursuant to which such workers do not become employees until they actually report for and commence work with the prospective employer? and

2. The prospective employer has no control over the transportation facilities and does not furnish the cost of the transportation except in the form of loans for such cost to the worker who is hired after he reaches the place of employment, which loan is deducted from future earnings?

With your inquiry you attached copies of two letters from one prospective employer seeking such workers through the assistance of the Florida state employment service. You point out that as part of the services offered through said employment service division of the Florida industrial commission there is a farm placement section which specializes in the recruitment and placement of migratory farm workers. The function of the farm placement section is to make contacts with these workers and their prospective employers and to assist in finding a means of transportation for such workers. These workers come from outside as well as inside this state. The correspondence which you enclosed indicates that the workers are transported by individual owners of trucks and busses, the employers having no control over such transportation; and that the employer does not hire these workers until such time as they arrive at their final destination and are accepted by said employer.

The determination of whether a prospective employer would be liable under the provisions of the workmen's compensation law (Ch. 440, F. S.) under the conditions and circumstances out-

lined in your enclosed correspondence, depends primarily upon whether an employer-employee relationship exists. As defined in §440.02 (2) (a), the word "employee" means:

. . . every person engaged in any employment under any appointment or *contract of hire* or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed. (Emphasis supplied.)

Therefore, the right to receive and the liability to pay workmen's compensation depends on the existence of a master-servant relationship, and such relationship must be created by contract, either express or implied. Applying the definition of the word "employee" to the specific facts outlined in your correspondence, it is my opinion that the prospective employer would not be liable under the workmen's compensation law for injuries incurred by workers during the course of transportation to the job since the relationship of an employer-employee does not appear to exist.

It should be pointed out that no attempt has been made in this opinion to determine the tort liability (irrespective of workmen's compensation liability) of the employer under the situation outlined in your inquiry. I am unable to determine with any degree of certainty whether such tort liability may arise based upon the limited set of facts outlined in your inquiry. However, it would appear that if the owners of the trucks transporting such workers are not agents of the prospective employer but rather are determined to be independent contractors, then it would follow that the prospective employer in the instant situation would not be liable for injuries to the transported workers. Whether one is in fact an independent contractor is to be determined by common law standards (*Florida Industrial Commission v. Schoenberg*, 117 So. 2d 538). Usually such classification is applied to "one who, in the course of independent employment or occupation, undertakes to perform work subject to the will or control of the person for whom the work is done only as to the result or product of the work, and not as to the means or methods chosen." (99 C. J. S., *Workmen's Comp.*, §90, p. 312).

A determination of the question of liability depends upon the facts and surrounding circumstances of each given situation. The comments expressed in this opinion are limited to the specific facts and conditions as outlined in your inquiry.

In order to properly determine the employer's tort liability in the instant situation, this question may be submitted to a court of competent jurisdiction.

Your question is therefore answered accordingly.

060-186—November 16, 1960

**PUBLIC RECORD—CLERK OF CIRCUIT COURT  
RECORDING OF JUDGMENTS IN "OFFICIAL RECORDS" AS  
PROVIDED BY §28.221, F. S.—§28.21, F. S.**

To: M. T. McInnis, Clerk Circuit Court, Bradenton

**QUESTIONS:**

1. Is it necessary to record the judgment in the "official records" pursuant to §28.221, F. S., where the clerk of the court has previously entered the judgment

in the minute book and recorded said judgment in the judgment lien record book pursuant to §28.21, F. S?

2. Is it necessary to index judgments in the judgment and execution docket if such judgment is properly indexed in the "official records"?

According to the provisions of §28.21, F. S., the clerk of the court is required to keep separate record and docket books, two of which are a minute book and a judgment lien record book (§28.21 (1), (11), *supra*). Once a judgment is recorded in the judgment lien and record book, it becomes a lien upon the real property of the judgment debtor (*Giddens v. McFarlan*, 152 Fla. 281, 10 So. 2d 807).

According to the provisions of §28.221, F. S., the legislature has provided an *alternative* method of recording the various kinds or classes of instruments previously recorded in the separate books under §28.21, *supra*. Under §28.221(1), the clerk may record any or all of these instruments in one general series of books to be called "official records." The recording of instruments in said "official records" imparts the same constructive notice as recording does in separate books under §28.21. Section 28.221(4), *supra*, provides that where certified transcripts of judgments are recorded in the "official records," such judgments shall become liens on real property of the judgment debtor "in the same manner as if said certified transcripts had been recorded in the judgment lien record" provided for under §28.21 (11).

In A. G. O. 057-104, April 25, 1957, pp. 119-121 of the 1957-58 biennial report of the attorney general, dealing with a factual situation converse to the instant inquiry, I pointed out that once a judgment or decree is recorded in the "official records," it becomes a lien on the real property of the debtor; and it is not necessary for such judgment to *thereafter* be recorded in the judgment lien record book. I also indicated in said opinion that the use of the "official records" system is not mandatory.

In regard to the instant situation, it is my present opinion that once the "official records" system has been adopted, the clerks of the court should adhere to that system *exclusively* in order to prevent duplicity in recording. In other words, where the "official records" have been adopted the clerks are required to merely *maintain* the judgment lien record book for the purpose of making available for examination the judgments recorded prior to the adoption of the "official records" system. After the "official records" system is adopted, judgments should be recorded only in the "official records" pursuant to §28.221, *supra*, and *not* recorded in the judgment lien book.

When the clerk uses the "official records" method there is serious doubt as to whether a lien would be created by erroneously recording an instrument in the judgment lien record book in the absence of recording such judgment in the "official records." Aside from the question of whether a lien is created, no doubt confusion would exist if a bona fide purchaser were required to examine both the judgment lien record book and the "official records" in order to ascertain whether a lien does in fact exist on a particular piece of property.

It should be pointed out that it is not the duty of the clerk to see that a judgment is recorded either in the judgment lien record



book or in the "official records," depending upon which system is used (A. G. O. 056-53, February 27, 1956, pp. 519-520 of the 1955-56 biennial report of the attorney general). This matter is within control of the judgment creditor or his attorney, whose duty it is to direct you to see that a certified copy of the judgment is appropriately recorded.

Your question is answered as follows: Where the "official records" system has been adopted, judgments should be recorded only in the "official records" pursuant to §28.221, *supra*. While it is true that recording a judgment in the "official records" would create a lien on realty without the necessity of recording the judgment in the judgment lien record book, doubt exists whether a judgment erroneously recorded in the judgment lien record book first without *thereafter* recording it in the "official records" creates a lien on realty where the "official records system is in use. Until such question has been presented to a court of competent jurisdiction for its determination, judgments need be recorded in the "official records" only.

As to question 2, in view of the statements expressed in answer to question 1, it is my opinion that when the "official records" system is used in lieu of the separate books now required, the indexing of the judgment in the "official record" index pursuant to §28.221 (2), F. S., would be sufficient.

Your question is answered accordingly.

060-187—November 15, 1960

#### SCHOOL CODE

COUNTY SCHOOL PERSONNEL AS AFFECTED BY RETIREMENT—§§231.36, 238.05(3), 238.181, F. S.—CH. 59-421 (§231.36 (5), F. S.)

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

#### QUESTIONS:

1. A teacher retires at the end of a school year, receives retirement benefits, returns to teaching the following year without missing any of the pre-school period.

a. If this teacher was on continuing contract before retirement, does she retain all of her continuing rights under §231.36?

b. If this teacher was on a CC salary status before retirement (\$300 over the annual contract salary) does she retain her CC salary status?

c. If this teacher was on a CC-10 salary status before retirement (\$600 over the annual contract salary) does she retain her CC-10 salary status?

2. A teacher retires at the end of a school year, receives retirement benefits, returns to teaching the following year after the pre-school starts, but before pupils are counted as being in attendance.

a. If this teacher was on continuing contract before retirement, does she retain all of her continuing rights under §231.36?

b. If this teacher was on a CC salary status before retirement (\$300 over the annual contract salary) does she retain her CC salary status?

c. If this teacher was on a CC-10 salary status before retirement (\$600 over the annual contract salary) does she retain her CC-10 salary status?

3. A teacher retires at the end of a school year, receives retirement benefits, returns to teaching the following year, misses the pre-school period, and starts after the pupils are counted as being in attendance.

a. If this teacher was on continuing contract before retirement, does she retain all of her continuing rights under §231.36?

b. If this teacher was on a CC salary status before retirement (\$300 over the annual contract salary) does she retain her CC salary status?

c. If this teacher was on a CC-10 salary status before retirement (\$600 over the annual contract salary) does she retain her CC-10 salary status?

4. A teacher retires at the end of a school year, receives retirement benefits, returns to teaching after missing a full year.

a. If this teacher was on continuing contract before retirement, does she retain all of her continuing rights under §231.36?

b. If this teacher was on a CC salary status before retirement (\$300 over the annual contract salary) does she retain her CC salary status?

c. If this teacher was on a CC-10 salary status before retirement (\$600 over the annual contract salary) does she retain her CC-10 salary status?

5. A teacher retires at the end of a school year, receives retirement benefits, returns to teaching after missing more than a full year.

a. If this teacher was on continuing contract before retirement, does she retain all of her continuing rights under §231.36?

b. If this teacher was on a CC salary status before retirement (\$300 over the annual contract salary) does she retain her CC salary status?

c. If this teacher was on a CC-10 salary status before retirement (\$600 over the annual contract salary) does she retain her CC-10 status?

6. If a teacher retired before the effective date of Ch. 59-421 (H. B. 1325), would she be in the same category as a teacher retiring after the effective date of said act?

7. A teacher who has been retired for five years on disability returned to teaching at the beginning of the 1960-61 pre-school period. She had 10 years of continuous service before she retired with a rank IV status. In the summer of 1960 she attained a rank III status by completing a four-year college degree.

a. Since she had rank IV before retirement does her present scholastic status entitle her to:

(1) A continuing contract?

(2) A continuing contract with additional CC-10 emoluments?

(3) An annual contract with rank III on the same basis as a beginning teacher?

b. Would the intervening retirement years count as service years in any wise?

Section 231.36, F. S., provides, in part: "... Each person to whom a continuing contract has been issued as provided herein shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board without the necessity for annual nomination or reappointment until such time as the position is discontinued, *the person resigns*, or until his contractual status is changed as prescribed below: . . ." (emphasis supplied).

Section 238.05 (3), F. S., relating to the teacher retirement system, provides, in part: "... membership of any person in the retirement system shall cease if he shall be continuously unemployed as a teacher for a period of more than five consecutive years; or upon the withdrawal of a member of his accumulated contributions . . . or upon retirement. . ." (emphasis supplied).

Section 238.181, F. S., provides:

*Retired member may be substitute teacher; conditions.—*

(1) Any member who has retired may be employed, on a substitute basis only, as a substitute teacher in any of the public free schools of this state, and such employment shall not affect the rights of such retired member under the retirement system, including, without limiting the general terms hereof, his right to receive his retirement allowance; provided that a county board of public instruction may employ as a substitute teacher a member who has retired only if the county board is unable to employ for such substitute teaching position, a qualified teacher who has not retired.

(2) A retired teacher may be employed on a part-time basis and receive compensation for services rendered without reducing or in any way affecting his retirement or pension status but in no case shall the part-time employment exceed two hundred hours in any single calendar year.

(3) Any member who hereafter retires and receives a retirement allowance under the provisions of this chapter shall have his retirement allowance suspended during any period of re-employment in any capacity whatsoever by the state or any political subdivision, department, branch, or agency thereof, except as in this chapter specifically provided.

Section 231.36 (5), F. S., provides:

Any member who has retired may interrupt retirement and be re-employed in any public school *during periods of emergency or critical need as determined by the county school board*; any member so re-employed by the same county from which he retired shall be entitled to continue on the same contractual basis that existed immediately prior to retirement. (Emphasis supplied.)

I believe your questions are answered in the above quoted statutory provisions.

When a teacher retires and begins to receive retirement bene-

fits she has necessarily resigned her position and her continuing contract is permanently terminated as provided by §231.36, F. S.

If the continuing contract is terminated by the resignation of the teacher there is no provision in the law for its reinstatement if the teacher later withdraws from her retirement status and goes back to teaching.

This is the case regardless of the interval of time between the teacher's resignation and retirement and her subsequent re-employment.

Your questions 1 through 5 and subdivisions thereof are all answered in the negative in so far as tenure is concerned. However, teachers re-employed on an emergency basis as provided in §231.36 (5) must be paid on the same basis that they were paid under their contractual status immediately prior to retiring (see our answer to question 6).

As to question 6, Ch. 59-421, now carried in the Florida Statutes as §231.36 (5) (quoted above), applies to all retired teachers regardless of the date of their retirement. Your question is therefore answered in the affirmative.

It should be pointed out that this act does not restore retired teachers who are subsequently re-employed to a permanent continuing contract status. It applies only to teachers re-employed "... during periods of emergency or critical need ..." and it is clearly contemplated that such re-employment shall be of a temporary nature lasting only during the period of emergency. It does require the teacher re-employed as provided in this act to be paid on the same basis that she was paid under her contractual status existing immediately prior to retirement.

As to question 7 a., parts 1 and 2 of this question are answered in the negative for the same reasons given in my answer to questions 1 through 5.

Part a. (3) of this question is answered in the affirmative.

As to question 7 b., this question is answered in the negative since there is no provision in the law for years spent in retirement to count as service years for any purpose.

060-188—November 28, 1960

#### JUVENILE COURTS

DELINQUENT OR DEPENDENT CHILD—INVESTIGATION  
AND PETITION BY COUNSELOR OR ASSISTANT—§§39.04,  
39.05 AND 39.06(2), F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs Ass'n,  
Tallahassee

#### QUESTION:

Who shall file the petition under §39.04, F. S., after an investigation by a juvenile court counselor which discloses reasonable grounds that the child is a delinquent or dependent child when said investigation was made upon the receipt of reliable information but prior to the filing of a petition?

Section 39.04, F. S., provides as follows:

*Upon receiving reliable information that a child within the county or district wherein the juvenile court is estab-*



lished is a dependent or delinquent child, *the counselor or an assistant counselor shall investigate* and, if the investigation discloses reasonable ground for belief that the child is a dependent or delinquent child, and no petition with reference to the child has been filed in that juvenile court, *shall file such a petition.* (Emphasis supplied.)

A careful study of the intent of §39.04, F. S., *supra*, appears to provide for an investigation upon the conditions set forth therein "prior" to the filing of the petition.

Section 39.05, F. S., provides that the petition may be filed by the counselor, assistant counselor, or any other person, based on information that may be personally unknown to the person signing it, if the person verifies by affidavit that the petition is based upon information and belief. However, such a petition would be sufficient, if it states facts which, if true, would constitute the child dependent or delinquent. Section 39.06 (2), F. S., provides, among other things, that *upon the filing of such petition, the "court shall investigate"* to determine if the facts set forth in the petition are true.

Therefore, although the language in §39.04, *supra*, may not be as clear as it possibly could be, it is my opinion that said section may be construed to mean the following:

1. That upon the receipt of reliable information an *investigation may be conducted* by either the counselor or assistant counselor of the juvenile court *without having to first file a petition himself* or get someone else to file it.

2. That *after such an investigation has been made, the counselor or assistant counselor shall file the petition*, provided, of course, that such investigation discloses reasonable grounds for belief that such child is either dependent or delinquent.

Your question is answered accordingly.

060-189—November 28, 1960

### TAXATION

#### TANGIBLE PERSONAL PROPERTY TAXES—BOATS OF MEMBERS OF ARMED FORCES—§200.44, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

When are boats and vessels owned by members of the armed forces of the U. S., found or used in Florida, subject to ad valorem and license taxes imposed under Florida statutes and laws?

Under §200.44, F. S., pleasure yachts and boats of nonresidents found in this state are not subject to ad valorem taxes in this state, provided the owner thereof exhibits to the taxing authorities, upon their demand, personal property tax receipts showing payment of taxes levied on such boat in the state or country of their permanent residence. This section of the statutes appears to be applicable to members of the armed forces of the U. S., as well as to persons, firms and corporations generally. "The place where the vessel may be registered or enrolled is not necessarily the place of taxation. Hence, a vessel is not subject to taxation in a particular place because registered or enrolled there, if the owner resides elsewhere, or if the vessel has acquired

an actual situs elsewhere." (84 C. J. S. 658, §321; see also 29 Fla. Jur. 347-348, §5). The place of enrollment or registration of boats and vessels is not the situs for taxation where the said boat or vessel has acquired a situs elsewhere. In 80 C. J. S., §3, it is stated that the home port of a boat or vessel is deemed to be the port that is "nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides." It is, therefore, evident that registration or enrollment of a vessel or boat does not of itself fix the situs of such vessel or boat for purposes of taxation.

In this connection §574, title 50 App., U. S. code, appears to be material, under which section it is provided that members of the armed services of the U. S. "shall not be deemed to have lost" their places of residence or domicile "solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of any other state . . . while, and solely by reason of being, so absent." The same rule is applicable to such person's tangible personal property for purposes of taxation. Under like circumstances the tangible personal property of such a person under military orders is presumed to remain with his actual residence or domicile, unless such property "*be used in or arising from a trade or business.*" This section seems to raise a presumption as to residence for the protection of the serviceman and his personal property. The presence of boats and vessels of service men located in Florida under and pursuant to military orders does not of that fact alone give such property a tax situs in Florida; neither does the fact that such a boat or vessel may have a Florida registration or enrollment, of that fact alone, give it a tax situs in Florida.

Section 574, title 50 App., U. S. code, above discussed, was held valid and constitutional in *Dameron v. Brodhead*, 345 U. S. 322, 73 S. Ct. 721, 97 L. ed. 1041. The fact that the state of residence or domicile of a member of the armed services, as preserved by said federal statute, does not exercise its right of taxation will not give any other state, wherein the property may then be located, a right to impose taxes thereon (see *Dameron v. Brodhead*, *supra*). So long as a member of the armed services may maintain his residence or domicile in his home state, without regard to the length of time he may be within another state pursuant to military orders, only his home state may tax such property so long as said §574, title 50 App. remains in force and effect. Although the phrase "residence or domicile" is used in said §574, such term is not defined by the said section or any other applicable statute. We presume the ordinary meaning was intended. In *Woodroffe v. Park Forest*, DC Ill., 107 Fed. Supp. 906, it was held that a member of the armed forces serving in a state other than his usual place of residence or domicile, did not bring himself from under the said act merely by securing living quarters for himself and family near the place where serving under military orders.

Before boats and vessels of members of the armed forces serving in Florida, who are residents or citizens of other states, may be assessed for personal property taxes in this state, it must be found and determined, upon proper and sufficient evidence that such person has, with intent to become a permanent citizen and resident of Florida, become a resident or citizen of Florida, intending to move

his permanent residence from the other state to Florida; or that such boats and vessels are being used in or in connection with the operation of some trade or business in Florida.

This seems to answer the above stated question as well as it may be generally answered.

060-190—November 28, 1960

#### RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM—SCHOOL TEACHERS—§§238.01, 238.05, 236.074, 236.075, 236.09, 236.13, 122.02, 122.03, 122.18, 227.14, CH. 122, F. S.; §9, ART. XII, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

May a school teacher who rejected membership in the teachers retirement system, pursuant to former statutes then in force and has continued to be a nonmember thereof, become a member of the state and county officers and employees retirement system?

Under §5, Ch. 19014, 1939, (§238.05, F. S.) school teachers thereunder became members of the teachers retirement system unless they "filed with the board of trustees a notice of his election not to be covered in the membership of the" teachers retirement system. The school teacher contemplated by the above stated question filed her notice of election not to become a member of the teachers retirement system, and has continued to be a nonmember of said teachers retirement system.

State and county officers and employees, within the purview of Ch. 122, F. S., include "all full time officers or employees who receive compensation for services rendered from state or county funds . . ." (§122.02(1) F. S.). However, said Ch. 122, F. S., does not "apply to members of the teachers' retirement system. . ." (§122.18, F. S.). Members of the teachers' retirement system include persons "included in the membership of the retirement system as provided in §238.05," F. S. (§238.01(5), F. S.). Under said §238.05, F. S., school teachers who filed with the "trustees a notice of his election not to be covered in the membership of the" teachers' retirement system, continue as nonmembers of that system unless they shall have elected to become members of that system in the manner provided in and by said §238.05; nothing appears in the file before us showing such an election to become a member of the teachers' retirement system of this state. We must presume that the teacher in question is not now, nor has she been, a member of the teachers' retirement system.

As above noted, the state and county officers and employees retirement system does not extend to or "apply to members of the teachers' retirement system" (§122.18, F. S.), nor did the state officers and employees retirement system (§16, Ch. 22831, 1945) or the county officers and employees retirement system (§16, Ch. 22938, 1945). School teachers are excluded from the state and county officers and employees retirement system, as well as former state and county retirement systems, by reason of membership in the teachers' retirement system not because of eligibility for membership. Under §2, Ch. 22938, 1945, county officers and employees, for the purpose of the retirement system thereunder, included "all full

time (county) officers and employees, except day laborers, who receive compensation for services rendered from county funds," the term "county funds" not being defined by the statute. The definition of state officers and employees (§2, Ch. 22831, 1945) contained a similar definition referring to state funds. The exemption from both of these 1945 acts included "*members of the teachers' retirement system,*" and it was expressly provided that the statutes relating to said teachers' retirement were not repealed. The teacher in question having rejected the teachers' retirement system act (Ch. 19014, 1939) *was not a member of that retirement system* on the effective day of the former state and county retirement systems or the present state and county retirement system. She was not then within the exemption of "*members of the teachers' retirement system.*"

At the time of the adoption of the state and county retirement systems in 1945 provision was made, in §227.14, F. S. (since repealed), for a "county current school fund" and a "county general school fund." Present statutes §§236.074 and 236.075, F. S., provide for county school funds, it being provided in §236.13, F. S., that "the foundation program fund apportioned to the credit of any county is to constitute a part of the county general school fund for that county. Section 236.09, F. S., makes provision for the apportionment of the "county current school fund." A county school fund is referred to in §9, Art. XII, State Const. This office, by its opinion of Jan. 15, 1959 (059-8), held that a person beginning to teach school in this state after attaining the age of 60, for which reason not within the *teachers' retirement system*, and not being a member of such system, was within the purview of the state and county officers and employees retirement system. The teacher in question, not being a member of the teachers' retirement system, and having never been a member thereof, is within the purview of the state and county officers and employees retirement system.

An examination of the provisions of §122.03, F. S., relative to prior service credits to certain officers and employees who had not claimed or received same, reveals that they are conditional in form, the provision being that they "may" claim such credits upon meeting specified requirements. The word "may" when used in a statute is usually construed as permissive and not mandatory, while the word "shall" is usually construed as mandatory. The context of a statute may require a different construction. We find nothing in §122.03 which seems to require that the word "may" be construed as "shall." Failure to claim credit for past service and make the required contributions merely reduces one's retirement pay if and when he retires.

The above stated question is answered in the affirmative, subject, however, to the above mentioned limitations.

060-191—December 5, 1960

#### FIREARMS

FORFEITURE WHEN FOUND UPON PERSON ARRESTED AND CONVICTED FOR OFFENSE INVOLVING USE OR ATTEMPTED USE THEREOF—§§790.07 AND 790.08(1), (2), F. S.

To: James C. Gwynn, County Judge, Tallahassee

#### QUESTION:

Do the provisions of §790.08, F. S., which relate to the forfeiture of certain weapons and arms, apply to a



gun belonging to a person who is arrested for a game law violation which involves the use or attempted use of such gun?

This question involves §790.07, F. S., and §790.08 (1) and (2), F. S., reading as follows:

790.07 *Persons engaged in criminal offense, having weapons.*—Whoever, when lawfully arrested while committing a criminal offense or a breach or disturbance of the public peace, is armed with or has on his person any slung shot, metallic knuckles, billies, firearms or other dangerous weapon, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars.

790.08 *Taking possession of weapons and arms; disposition; custody.*—

(1) Every officer making an arrest under the preceding section, or under any other law or municipal ordinance within the state, shall take possession of any weapons or arms mentioned in the preceding section, found upon the person arrested and deliver them to the sheriff of the county, or the chief of police of the municipality wherein the arrest is made, who shall retain the same until after the trial of the person arrested.

(2) If the person arrested as aforesaid be convicted of violating §790.07, or of a similar offense under any municipal ordinance, or any other offense involving the use or attempted use of such weapons or arms, such weapons or arms shall become forfeited to the state, without any order of forfeiture being necessary although the making of such an order shall be deemed proper, and shall be forthwith delivered by the sheriff or chief of police having custody thereof to the adjutant general of the military department of the state, who is hereby made the custodian of such weapons and arms for the state. (Emphasis supplied.)

My construction of said subsections (1) and (2) is that they evidence a legislative intent that if any of the weapons or arms mentioned in §790.07 are found upon a person arrested for any "offense involving the use or attempted use" thereof, such weapons or arms are forfeited upon the conviction of the person arrested for such offense. A gun is one of the weapons or arms mentioned in §790.07, and the words "offense involving the use or attempted use of such weapons or arms" include an offense against the hunting laws which involves the use or attempted use of a gun. Therefore, I am of the opinion that when a gun is found upon a person arrested for a hunting law offense which involves the use or attempted use of such gun, the above-quoted §790.08(2) requires the forfeiture of such gun upon the conviction of the person arrested for such offense.

On the other hand, I do not think that the forfeiture provisions of said subsection (2) are applicable to a gun found upon a person who is arrested for driving with an improper tag or for engaging in a poker game, or for committing any other offense which does not involve the use or attempted use of the gun. This is so because such offenses do not come within the words of said subsection (2), "offense involving the use or attempted use" of the gun.

It is my opinion that your question is properly answered in the affirmative.

060-192—December 6, 1960

# GAMBLING

## "SCHLITZ FLORIDA \$500,000 FISHING CONTEST"—LOTTERY

To: *Ernest Mitts, Director, State Board of Conservation,  
Tallahassee*

### QUESTION:

**Does the "Schlitz Florida \$500,000 Fishing Contest" constitute a lottery under state laws?**

Omitting a great deal of the unessential details, it would appear that this contest is to be initiated by the brewing company, in cooperation with several state agencies, releasing in inland and coastal waters, tagged fresh and salt water fish. Any person catching one of these fish will be eligible for a cash prize (the amount of which was previously determined by chance under procedures not material for the purposes of this opinion) upon presentation of the fish to the nearest wholesaler of the brewing company. The name and location of the nearest wholesaler will be available from any beer retailer. As a prerequisite to the receipt of the cash prize, a winner must execute a release agreeing to the use of his name, picture or other publicity arrangements by the brewing company.

There are three elements in a lottery, viz: a prize, an award by chance and a consideration.

The element of prize obviously exists in this contest inasmuch as a cash award will be given to a winner.

Although there is some element of skill in catching fish, the use of such skill is not the determining factor in this contest. This is so due to the fact that several thousand tagged fish will be released among the millions of fish living in our waters and the possibility of a person, by the use of his fishing skill, catching a tagged fish is so remote that it must be said that chance predominates over skill in this contest so that the second element of a lottery, e.g., an award by chance, is present. This opinion is, however, subject to the one exception hereinafter discussed.

The one exception to the above discussion of an award by chance arises by virtue of the fact that the brewing company plans to obtain a release agreeing to the use of the name, picture, etc., of a winning contestant. If this release is obtained without any intention of ever using it, then it would seem apparent that such release was a mere subterfuge and that the award would still be by chance even when this factor is considered. That is to say, the actual failure to use the winning contestants in the advertising campaigns of the company would be a factor to consider in the intent of the company.

However, if the company intends to make use of the names and pictures of the winning contestants, or to use them in some other phase in the company's advertising campaign, and if, in fact, the company does make such use, it is my opinion that the scheme would not constitute a mere subterfuge and the element of chance would not predominate. This is so for the reason

that it is a well-known common practice of industry to secure and pay for endorsements of products which endorsements are used in advertising campaigns. Of course, prominent individuals are most often used for this purpose but that does not mean that an average citizen cannot give his endorsement to a product. In recent years, many companies have utilized endorsements of average citizens for this purpose. It is, of course, realized that the opportunity to give this endorsement is obtained by chance. That does not, however, affect the fact that persons having by chance obtained the opportunity to give an endorsement to this company a successful contestant would contract away their right to privacy by the use of their names, pictures or other reasonable publicity arrangements in any reasonable and proper manner that the company would see fit to use.

This office has held on countless occasions that the element of consideration may be found in schemes such as this by the participants expending time and travel expenses and suffering inconvenience to go to the place of business of the enterprise conducting a contest in order to win such contest. Here, the contestant must go to the nearest Schlitz wholesaler. In the event that the name and address of the nearest wholesaler is not known, the contestant can obtain such information from the nearest retailer. Under the latter circumstance, the brewing company would not only receive the benefits of exposing his goods to the members of the general public at the wholesaler's place of business, but would also obtain the same exposure at the retailers who stock the brewing company's product. I, therefore, am of the opinion that the element of consideration is present.

Depending upon a resolution of the variables discussed above, this contest may or may not constitute a lottery under the laws of this state. That is to say, if the company makes a good faith use of the winning contestants in their advertising campaign, then this would not constitute a lottery. However, should such use not be made, then it would appear that all of the elements of a lottery are present in this scheme.

060-193—December 7, 1960

#### PUBLIC MONEY

EXPENDITURE BY COUNTY OFFICERS—CONSTRUCTION  
OF "NECESSARY EXPENSE"—§§145.02, 30.49, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

#### QUESTIONS:

1. Can a sheriff purchase cows at premium prices (for instance, over \$300 each) at Suwannee river livestock show, serve the low grade meat to prisoners, allowance being made for the value of the meat, and serve the remaining portions of the meat to "FFA" and other youth of the county at their annual outings; this being considered in the nature of a substitute for a "junior deputy program"?

2. Can a sheriff properly expend \$714.90 to purchase choice steaks over a period of 23 months to be served at monthly meetings of his office force and deputies with members of the Florida highway patrol, state attorneys,

circuit judges, and members of the board of county commissioners, to promote good will and better public relations by the local law enforcement agency?

3. Can a sheriff properly expend \$48.50 to pay for two luncheons with board of county commissioners to obtain the same objective as shown in question 2 above?

Section 145.02, F. S., defines "net income" for county officials who are paid by fees or commissions as follows:

The residue of the income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office.

With regard to question 1 above, reference is made to A. G. O. 055-285, dated October 27, 1955, which was in reply to the following question from your office:

May expenses incurred in connection with the organization and operation of the junior deputy program, sponsored by the national association of sheriffs, be properly charged to the expenses of the sheriff's office, under §145.02, F. S.?

The appropriate portion of the opinion which best answers this question is as follows:

The cost of the junior deputy program can be justified as an incidental expense *provided the same is kept to a reasonable amount*. The expenditure should be in good faith and not in the interest of political favor or advancement. (Emphasis supplied).

The above opinion was rendered in reply to an inquiry requesting this office to construe §145.02, F. S., which was in effect at that time, and the compensation of sheriffs was based upon a fee system. The 1959 legislature passed an act placing the sheriffs of the state on a budget system of operation, and the appropriate section of this act, as it concerns the questions being considered in this opinion, is §30.49(2), F. S., the pertinent portion of which reads:

The sheriff shall submit with the proposed budget his sworn certificate stating that the proposed *expenditures are reasonable and necessary* for the proper and efficient operation of the office for the ensuing year (Emphasis supplied).

The language used in this new act insofar as it relates to the question of necessary expenses for the proper operation of the office is so similar in meaning with §145.02, F. S., that any opinion rendered or conclusion reached in interpreting §145.02, F. S., applies with equal force and effect to the new budget legislation, §30.49, F. S.

The phrase "necessary expense" seems to extend "to such expenses as are clearly incidental to the execution of the power granted, or which necessarily arises in the fulfillment of the duties imposed by law." (28 Words and Phrases, 256-276).

Since the practice mentioned consists of paying premium prices for meat to be used in furnishing meals for certain youth of the county with no apparent specific program for these young people, sponsored by the sheriff's office, it is my opinion this practice does not come within the scope of allowable expenses as described in the opinion of the attorney general referred to above. The cost involved



appear to me to be entirely out of line with the doubtful results obtained under the described program.

With reference to questions 2 and 3, it is my opinion that the purchase of choice steaks for use in having regular monthly meetings of the officials mentioned cannot be justified as being a necessary expenditure for the proper operation of the sheriff's office. It must be conceded that it is necessary for these officials, in the performance of their official duties, to have conferences with each other at frequent but perhaps irregular intervals. I can see no objection to having some of these meetings at the jail at regular mealtime where the regular menu is used and the expenses of such meals being properly charged to the office of the sheriff. Such an arrangement would be of some value and convenience to these officials, however, it should be pointed out that to justify the expenses involved for such meals as being a proper charge for the sheriff's office, the officials participating should make certain the primary purpose of the meetings was connected with official business and not merely a social gathering, coincidentally held at mealtime.

In arriving at this conclusion, there is no desire to discourage or interfere with the commendable efforts of these officials to promote better relations and improve the understanding of their mutual problems, however, the attendant expenses should have a sound relationship between the amount expended and the results obtained. As I view the facts in the instant case and apply the definition of "necessary expense" (see Words and Phrases, *supra*) I do not feel that such expenses come within the purview of necessary expense, as set forth in §30.49, F. S. Your questions are answered accordingly.

060-194—December 8, 1960

#### TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE STOCK—  
TRANSFER TO NOMINEE OF DEPOSITARY—§691.03(13);—  
CH. 201, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Where corporate stock is issued in the name of the nominee of a depositary, for subsequent transfer to the person entitled thereto, what amount of documentary stamp taxes is required for the completed transaction?

Specifically a natural gas company, incorporated and doing business in Florida, desiring to refinance outstanding subordinated debenture obligations totaling \$833,200, determined to refinance the same by issuance of new debenture obligations totaling the sum of \$416,600, together with 41,660 shares of preferred stock with a par value of \$5 per share, and 41,660 shares of common stock, having a par value of \$1 per share, but with an actual value in excess of par value. The plan devised contemplated the exchange of units of new debentures totaling \$50, together with 5 shares of preferred and 5 shares of common stock, for each \$100 of value of the old or outstanding debentures. To accomplish this exchange a deposit agreement was entered into by and between the natural gas company and a national bank transacting business

in Florida to act as depositary of the said units of debentures and preferred and common stock.

The new debentures appear to have been executed in the name of the holders of the outstanding debenture obligations as their interests appeared from corporate records, and the preferred and common stock in the name of nominees of the depositary, to be held for delivery to the owners of the new debentures above mentioned. Upon the acceptance of one of the new debentures in lieu of the outstanding debentures, the holder of the new debenture became entitled to the shares of preferred and common stock attached to the ownership of the said new debenture, delivery thereof to be made at the time of the termination of the deposit agreement. It was stipulated by the deposit agreement said stock "shall be held by said depositary and its successors as custodian for the owners of the shares of preferred and common stock upon and subject to the terms of" the said deposit agreement. For all practical purposes, including voting at stockholders meetings and receiving dividends and other distributions made in connection therewith, the debenture holders are owners of the stock. This seems to bring us to the question of the status of the transfer of the shares of the corporate stock to or in the name of the "nominee or nominees of the depositary."

Section 691.03(13), F. S., provides that "in the absence of contrary or limiting provisions in the trust instrument or a subsequent order or decree of a court of competent jurisdiction, the trustee of an express trust is authorized . . . to hold any corporate stock in his own name or in the name of a nominee with or without disclosing any fiduciary relationship, but the trustee, however, shall be responsible for all acts and omissions of such nominee relating to such property. The reference to a nominee in the statute above quoted contemplates the holding of trust property by a nominee and the registration of corporate stock in the name of the nominee. There is little law in the recorded cases on the legal status of such a nominee. It was stated in *Cisco v. Van Lew*, 60 Cal. App. 2d 575, 141 P. 2d 433, text 438, that the term *nominee* "seems to contemplate the holding of trust property by a trustee through and by his nominee or agent." In *Schuh Trading Co. v. Commissioner*, CCA 7th, 95 Fed. 2d 404, text 411, it was stated that "the word *nominee* ordinarily indicates one designated to act for another as his representative in a rather limited sense." In *B. F. Avery & Sons Co. v. Glenn*, DC Ky., 16 Fed. Supp. 544, text 547-8, it was stated that "there is a substantial difference between a nominee and a trustee. A nominee is synonymous with an agent . . . who represents and acts for his principal." (See also 66 C. J. S. 600, and cases cited.)

An examination of Ch. 201, F. S. (excise tax on documents), reveals that it was derived from Ch. 15787, 1931, which was patterned after the federal excise tax on documents then in force, to such an extent to take the same construction in the Florida courts as is given it in the federal courts (*Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22; *State v. Cook*, 108 Fla. 157, 146 So. 223), except where such a construction would be violative of the Florida constitution or her public policy. Although there have been some changes in the federal statutes, especially §4322, title 26, of the U. S. code, such changes appear to have been introduced into the federal statutes during the revision and amendments thereof constituting

the 1939 federal revenue code. Said §4322, title 26, of the federal code, provides an exemption from the federal tax where corporate stock is transferred "from a corporation to a registered *nominee* of such corporation, or from one such nominee to another, such nominee, provided that in each instance such shares, certificates or rights are held by the nominee for the same purpose as if retained by the corporation; or from such nominee to the corporation." It seems, therefore, that the transaction contemplated by the above question is probably tax exempt under said federal statute. However, there is no like provision for exemption in the Florida Statutes.

We shall next consider the answer to the above question under federal statutes prior to the amendment and revision thereof and the introduction of said §4322, title 26, of the federal code, about 1939. The decisions of the lower courts, in the cases on review by the supreme court of the U. S. in *Founders General Corp. v. Hoey*, 300 U. S. 268, 57 S. Ct. 512, 81 L. ed. 639, were conflicting as appears from the court's opinion therein, the issue before the court and decided by it in the said case, as stated by the court, was "when, at the instance of one entitled to receive stock, the certificates therefor are, at his request and for his convenience, issued by the corporation in the name of a nominee who receives no beneficial interest therein, does the transaction involve a transfer by the beneficial owner requiring a documentary stamp pursuant" to the federal revenue act of 1926? The transaction was held subject to taxation under the federal revenue act of 1926. The Florida statute, being substantially identical with the said federal statute from which derived takes the same construction in the Florida courts as in the federal courts (*Gay v. Inter-County Tel. and Tel. Co.*, supra, and *State v. Cook*, supra). There does not appear to have been any attempt on the part of the Florida legislature to conform the Florida statute to the federal amendments. Here, as in *Founders General Corp. v. Hoey*, supra, the stock passed through the "nominee of the depository," as a step in vesting the title in its ultimate owner.

The court, in *Selected American Shares v. U. S.*, CCA 7th, 196 Fed. 2d 473, text 475, referring to *Founders General Corp. v. U. S.*, supra, stated that the supreme court held "that by causing the transfer to be made to a nominee instead of itself the taxpayer had made a taxable transfer." The court then further remarked that in none of the three cases involved in the *Founders General Corp.* opinion "did the transfer involve the transfer of the beneficial interest, that fact was, in view of the language of the act (federal revenue act of 1926) without significance." The amendment of the federal statute, after its adoption by the Florida legislature, is not effective in Florida unless adopted by the Florida legislature (82 C. J. S. 860, §371). The Florida statute adopting the federal act was not ambulatory as to subsequent federal legislation on the same subject, so as to bring into the Florida statutes the congressional amendments (*Florida Indus. Com. v. State*, 155 Fla. 772, 21 So. 2d 599, text 603; *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495, text 497; see also Annotations in 133 A. L. R. 401-405, 166 A. L. R. 518-520 and 42 A. L. R. 2d 798 and 799). This being true, in the absence of state legislation adopting the same, the amendment by §4322, title 26, of the federal revenue code, has no application to Ch. 201, F. S., so that the rule of *Founders General Corp. v. Hoey*, supra, is applicable when construing the Florida Statutes.

From the above and foregoing it appears that the stock transaction described in the above question is within the purview of Ch. 201, F. S., and subject to a documentary stamp tax upon the transfer to the nominee of the depository, although he held no beneficial interest in the securities while standing in his name as nominee. A transfer from said nominee to the owner of the securities would be another transfer under the Florida statute.

060-195—December 8, 1960

#### TAXATION

TAX EXEMPTIONS—HISTORICAL ASSOCIATIONS—§1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Is a historical association, incorporated as a non-profit corporation, entitled to tax exemption for its real and personal property?**

This question deals with ad valorem taxes only so that §1, Art. IX, and §16, Art. XVI, State Const., are applicable, which sections make provision for tax exemption of real and personal property "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Under these constitutional provisions and the statutes implementing them, ownership and utilization of the property are the criteria determining the right to exemption from taxation. Ownership alone is not sufficient; there shall also be utilization for one or more of the purposes above mentioned. This being true, the right to tax exemption becomes one primarily of fact and not of law. (1957-1958 A.G.O. 182). Should the tax assessor find from the evidence, facts and circumstances before him that the property of a nonprofit corporation or association is "*held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes," he should grant tax exemption, otherwise not.

The request for opinion specifically mentions the "Historical Association of Southern Florida," a nonprofit corporation or association, and attaches a copy of its charter. Although the powers mentioned in the charter are not of themselves sufficient evidence of the use of its property and whether the same is held and used exclusively for the above purposes, or any of them, they are suggestive of such use and may be resorted to, in connection with all other available evidence, in determining the intended use of its property, but the same is not determinative of the question. Evidence of the actual use and utilization for one or more of the above mentioned purposes should be required sufficient to convince the tax assessor of such use; and it is the burden of the taxpayer claiming the exemption to furnish such evidence when demanded by the tax assessor.

Historical societies have been held entitled to tax exemption where the facts and circumstances justified such exemption under applicable laws (Portsmouth Historical Society v. City of Portsmouth, 89 N. H. 283, 197 A. 712; 84 C. J. S. 571, §285, note 15). Should the tax assessor ascertain and determine that the lands, buildings and personal property of the said "Historical Association of Southern Florida," above mentioned, are "held and used ex-



clusively" for one or more of the purposes above referred to and set out in §1, Art. IX, and §16, Art. XVI, State Const., then such property may be granted tax exemption, otherwise not.

060-196—December 9, 1960

#### BEVERAGE LAW

BEVERAGE VENDORS—LICENSE TAXES—1960 CENSUS,  
EFFECT—§§561.34, 561.36, 561.26, 561.27, 561.12, F. S.

To: *L. Grant Peebles, Director, State Beverage Department,  
Tallahassee*

#### QUESTION:

What effect, if any, does the federal census of 1960 have upon beverage licenses and renewals thereof issued, either before or after the effective date of such census?

Section 561.34 F. S., imposes a license tax on beverage vendors graduated in amount according to the population of the county wherein transacting business, according to the latest state or federal census. This license tax (state license) ranges from \$200 per annum in counties having a population of 10,000, or less, to \$750 per annum in counties having a population in excess of 100,000. In addition to said state tax, a county tax in a like amount is also imposed. Such license taxes are required to be paid annually on or before Oct. 1, except where the licensee began such business subsequent to said Oct. 1; however, in either case the license expires on the following Oct. 1 and must be renewed on or before said date. (§§561.26 and 561.27, F. S.). "All funds collected by the state under the beverage law shall be paid into the state treasury to the credit of the general revenue fund." (§561.12, F. S.). These license taxes, therefore, appear to be revenue taxes and not regulatory fees. Municipal license taxes are provided by §561.36, F. S.

The increase of the license taxes, consequent upon increased county population as reflected by the 1960 federal census, under said §561.34, became effective upon the official publication, promulgation or announcement, as contemplated by §143, title 13, of the U. S. code (A. G. O. 060-154, Sept. 15, 1960), which publication, promulgation or announcement occurred subsequent to said Oct. 1, 1960, to wit, sometime during the latter part of November 1960. The amount of a license tax may, at the discretion of the legislature, be increased or decreased during a current license year, even after it has been paid under the prior law for that year (Dept. of Industrial Relations v. West Boylston Mfg. Co., 253 Ala. 67, 42 So. 2d 787, text 795; 53 C. J. S. 514 §18). "The constitutional inhibition as to the impairment of the obligations of contracts does not extend to licenses. A license itself is not a contract between the sovereignty and the licensee, and is not a property in any constitutional sense." (33 Am. Jur. 342, §21; State v. Fuller, 134 Fla. 212, 183 So. 726, text 727 and 136 Fla. 788, 187 So. 148, text 150). There being no inhibition on the legislature preventing it increasing a license tax during a license year, even after the license tax has been paid under the prior law, we come to a construction of §561.34, F. S., and other applicable statutes, for the purpose of determining the intention of the legislature in this connection.

There is no express provision in the applicable statutes that the increased license fees shall become immediately applicable upon the final publication, promulgation or announcement of the new census figures, or that additional taxes, imposed by reason of the census increase, be collected from existing licensees. In *State v. Green*, Fla., 101 So. 2d 805, text 807, the court recognized "the presumption that a legislative act operates prospectively unless the intent that it operate retrospectively is clearly expressed," and in the same case the court recognized the further rule that statutes imposing taxes must be clear and specific and that such statutes will be liberally construed in favor of the taxpayer and against the taxing authority. In *State v. Green*, supra, it was held that an increase in an ad valorem tax, made by the legislature after the assessment date of Jan. 1 of the tax year, should not be construed as being applicable for that tax year, but would be applicable to the following and subsequent years. In the absence of anything in a statute to overcome it, the presumption is that a statute operates prospectively only (82 C. J. S. 990, §415) and generally retroactive construction will not be given a statute so as to impose liabilities not existing at the time of its passage (82 C. J. S. 995, §418).

The application of said §561.34, F. S., is by county population "according to the latest state or federal census," of which the 1960 federal is the latest. The license taxes in the several counties may, and often do, increase or decrease in amount where the county population increases or decreases as reflected by successive census. "It is well-established rule that an act under which municipalities (or counties) are classified on the basis of population does not fall within a constitutional inhibition against special or local laws, or conflict with a provision requiring general laws to have uniform operation, where the classification has reasonable relation to the purposes and objects of the legislation . . . ." (37 Am. Jur. 710, §99; see also 82 C. J. S. 309-312, §191). The 1960 federal census, upon its publication, promulgation or announcement, had the effect, in several instances, of transferring counties from the operation of one subsection under said §561.34 to another subsection, thereby either increasing or decreasing the amount of the annual license taxes under said section. The court, in *Clark v. Greenville*, 221 N. C. 255, 20 S. E. 2d 56, had before it a statute providing for license taxes by municipal corporations dependent in amount upon the census population of such municipality. These license taxes were due and payable on July 1 of the tax year. Greenville was within the population bracket under the 1930 census imposing a \$25 license fee, under the population bracket of the 1940 census a \$50 license fee was required. The 1940 census, not being officially available until after said July 1 of the tax year, the court held that the tax was to be determined by the 1930 census. We find no other case specifically in point.

We, therefore, feel that no additional license taxes may be required of those persons obtaining licenses prior to the official publication, promulgation or announcement of the 1960 census. The license taxes imposed by said §561.34, purchased between Oct. 1 and April 1 of the tax year, are the same in amount as those purchased on said Oct. 1 (§561.26, F. S.); however, licenses purchased after said April 1 are only one-half of the annual license. It has been held that statutes at the time an excise tax is im-

posed continue in force for its collection notwithstanding the amendment or repeal of the taxing statute (*Lee v. Walgreen Drug Stores Co.*, 151 Fla. 648, 10 So. 2d 314, text 316). In *Lee v. Walgreen Drug Co.*, 142 Fla. 534, 195 So. 166, the number of stores operated by Walgreen at the beginning of the license year required a per store license (class 4) of \$200 per store; however, during the tax year additional stores were added to the chain, bringing the chain into class 5 of the chain store act and into a class requiring a license of \$300 per store. This increased tax was held applicable to the chain, including those stores upon which class 4 taxes had been paid, if they were to be operated for the balance of the tax year.

We are of the view that the increased license taxes became applicable to beverage stores opening subsequent to the official publication, promulgation or announcement of the 1960 official federal census, and that licenses issued subsequent to such date bear the license rate applicable to the increased population, but where licenses were purchased and paid for prior to said date, under the 1950 census, no additional taxes may be imposed by reason of the increased rate.

These observations seem to answer the above question.

060-197—December 14, 1960

#### TAXATION

INTANGIBLE TAXES—AGREEMENTS NOT TO ENCUMBER OR TRANSFER REAL PROPERTY—§1, ART. IX, STATE CONST., §199.02(3), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

Are agreements not to encumber or transfer real property, given in connection with an existing indebtedness, mortgages, deeds of trust or other liens within the purview of §1, Art. IX, Florida Const., and §199.02(3), F. S.?

Section 1, Art. IX, Florida Const., provides in part that "as to obligations secured by mortgage, deed of trust or other lien, the legislature may prescribe an intangible tax . . . which shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation . . ." Section 199.02(3), F. S., classifies obligations "for payment of money which are secured by mortgage, deed of trust or other lien upon real property." In short, if the said *agreement not to encumber or transfer real property* is either a "mortgage, deed of trust or other lien," within the purview of said constitutional and statutory provisions, then the obligation secured thereby is class "C" intangible personal property. We have before us two so called agreements not to encumber or transfer property wherein written obligations to pay money are mentioned, one in the sum of \$2934.75 and the other in the sum of \$2184.

In the one mentioning the indebtedness of \$2934.75, the landowner, designated therein as the "borrower" covenants, promises and agrees that so long as the said indebtedness, or any part thereof, remains unpaid that (1) the landowner maintain payments, insurance, taxes, etc., required of him under the obligation papers evidencing the said indebtedness, (2) does not create or permit any

lien or other encumbrance to exist against such property, without the lender's consent, (3) does not sell, transfer, assign, hypothecate or otherwise dispose of the said property, or any of it, (4) agrees that in case of default the indebtedness becomes due and payable, and that thereupon the lender shall "have a lien on all of the property of the borrower, both real and personal, including, but not limited to the" property described in the instrument, "which lien may be enforced by foreclosure in the same manner as a mortgage may be enforced on default." In the instrument mentioning the indebtedness of \$2184, the borrower acknowledges the said indebtedness, and agrees not to create or permit any lien or other encumbrance against the property, and not to transfer, sell, assign, or in any manner dispose of the property. To make payments on the indebtedness when due, and assigns to the holder of the indebtedness income from said property "as rental or otherwise or on account of such real property, reserving unto the obligor the right to such rentals, etc.," prior to default. It is recited that "this instrument is expressly intended for the benefit and protection of the seller and its assigns and subsequent holders of the note described." These agreements not to sell and convey, etc. are encumbrances within the purview of *Gore v. General Prop. Corp.*, 149 Fla. 690, 6 So. 2d 837, text 840; *Gables Racing Ass'n v. Persky*, 148 Fla. 627, 6 So. 2d 257, text 263; *Flood v. Graham*, 61 Fla. 207, 54 So. 456, text 458; *Black's Law Dictionary*; 42 C. J. S. 549, et seq.

Section 697.01, F. S., provides that all "conveyances, obligations, conditioned or defeasible, bills of sale or other instruments of writing *conveying or selling property*, either real or personal, for the purpose of or with the intent of securing the payment of money . . . shall be deemed and held mortgages." This statute recognized and adopted the equitable rule that a mortgage of real property is merely a lien and not title (*Walls v. Endel*, 20 Fla. 86, text 96). This statute abolished the title theory of mortgages and adopted the lien or equitable theory thereof. Although the instruments were doubtless intended as an additional security for the payment of the indebtedness therein mentioned, in *Weed v. Stanley*, 12 Fla. 166, a lease of real property provided that "the rent should be paid before the crops should be removed from the plantation," which covenant was held "manifestly designed to 'secure the payment of money' which should become due for the use and occupation" of the leased lands. This document was held to be "within the very words of the statute" of 1838 as amended in 1853, now said §697.01, F. S.

Section 1, Art. IX, State Const., and §199.02, F. S., extend to written obligations secured by *liens*, as well as by mortgages and deeds of trust (mortgages, deeds of trust and other liens). A lien has been said to be "a charge upon property for the payment or discharge of a debt or duty," (*Case v. Texas Co.*, 115 Fla. 668, 156 So. 137, text 141). Courts have recognized common law liens (53 C. J. S. 826, §1) and equitable liens (53 C. J. S. 830, §1). An equitable lien has been said to be "the right to have property subjected in a court of equity to the payment of a claim" (53 C. J. S. 831, §1), "it is simply a right of a special nature over the thing, which constitutes a charge or incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action." (*Gables Racing Ass'n v. Persky*, 148 Fla. 627, 6 So. 2d 257, text 263; *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127). An equitable lien does not divest the debtor of title or possession; it is merely a charge on the



property for the purpose of security (53 C. J. S. 832, §1). Such "liens may arise from written contracts which show an intention to charge some particular property with a debt or obligation" (Ross v. Gerung, Fla., 69 So. 2d 650, text 652). It, therefore, appears that the two agreements not to encumber or transfer property, so long as the mentioned indebtednesses remain unpaid, clearly show an intention to provide additional security for the payment of such indebtednesses, which amount to equitable liens.

Being of the view that the said agreements not to encumber or transfer real property are in equity equitable liens, which we deem to be within the phrase "other liens" as used in §1, Art. IX, State Const., and §199.02 F. S., so that the indebtednesses mentioned in said agreements not to encumber or transfer are class "C" intangible personal property within said constitutional and statutory provisions. As to the particular agreements, the above question is answered in the affirmative. As to other agreements, care must be exercised to determine the purpose of the agreement not to encumber or transfer or similar.

060-198—December 15, 1960

#### CRIMES

#### UNLAWFUL POSSESSION OF FIREARMS BY FELONS—APPLICATION OF §790.23, F. S., TO MUNICIPAL POLICE OFFICERS—§25, ART. XVI, STATE CONST.

To: Paul G. Hyman, City Attorney, North Bay Village, Miami

#### QUESTION:

Is it a violation of §790.23, F. S., for a municipal police officer to own a pistol or have a pistol in his care, custody, possession, or control when he was convicted of a felony in 1927 and has never had his civil rights restored?

Section 790.23, F. S., reads as follows:

790.23 *Felons; possession of firearms unlawful; exception; penalty.*—

(1) It shall be unlawful for any person who has been convicted of a felony to own or to have in his care, custody, possession or control any pistol, sawed-off rifle or sawed-off shotgun. A sawed-off rifle or sawed-off shotgun is defined for the purposes of this section as being any rifle or shotgun with a caliber greater than twenty-two caliber and with a barrel less than eighteen inches long.

(2) This section shall not apply to a person having been convicted of a felony whose civil rights have been restored.

(3) Any person convicted of violating this section shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for not more than ten years.

Said statute makes no exception in favor of municipal police officers and I think that it applies to them to the same extent as though they were not police officers.

While your letter states that the police officer in question was convicted of a "felony," I call your attention to §25, Art. XVI, State Const., which reads:

Section 25. Definition of felony.—The term felony,

whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary.

According to the construction placed upon said constitutional provision by the supreme court of Florida in *Duggar v. State*, 43 So. 2d 860, the word "felony," when used in a statute without any language to indicate a legislative intent to give the word a broader meaning, must be taken to mean an offense punishable (1) with death, regardless of where the conviction occurred, or (2) by imprisonment in the state penitentiary.

The word "felony" as used in §790.23, F. S., is not qualified by any language which could evidence a legislative intent that it be given a broader meaning than that given to it by §25, Art. XVI. A man who has been convicted of a felony under the laws of another state, or of the U. S., has not been convicted of an offense punishable with imprisonment in the state penitentiary and therefore, §790.23 would not apply to him unless such a felony was punishable with death.

Consequently, it is a violation of §790.23 for the police officer in question to own a pistol, or have one in his care, custody, possession or control, *if, and only if*, (1) his conviction was in a Florida court for an offense punishable with imprisonment in the state penitentiary or (2) the offense for which he was convicted was punishable with death, regardless of whether he was convicted under the laws of Florida or under the laws of another state or of the United States.

060-199—December 16, 1960

#### TAXATION

#### DOCUMENTARY STAMP TAXES—CONVEYANCES TO REMOVE CLOUDS FROM TITLE—§201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are documentary stamp taxes due on conveyances to remove clouds from title to real property, and if so, what is the measure of the taxes due?

Our opinion of Oct. 11, 1960 (060-165) considers the taxability of conveyances given by vendees to vendors in satisfaction of the vendees' obligations under written contracts to purchase real property. Here we consider *not* conveyances in satisfaction of such written obligations to purchase, *but* conveyances given for the purpose of removing clouds on the title to real property. In general, a cloud on the title to real property is the semblance of a title or interest which, although in fact unfounded, nevertheless appears to be valid and casts a doubt on the validity of the record title. A contract for the sale of lands may constitute a cloud on title against which the landowner may be entitled to have his title quieted (74 C. J. S. 27, §14).

Subject to the rule against following inconsistent remedies, the vendor under a contract to sell and convey real property, may, upon breach of the contract by the vendee, bring an action for damages for the breach, sue in equity for specific performance, sue for the unpaid purchase price, proceed to enforce his vendor's lien, or, in some cases, sue for the recovery of the land when in possession of the

vendee. However, a vendor may not invoke a remedy based on affirmation of the contract and also invoke a remedy which is based on disaffirmance of the contract. A vendor may not sue for the purchase price and also have an action for damages, or for rescission, or reclaim possession of the land, or foreclose the vendee's interest (92 C. J. S. 309-313, §§375 and 376). Contracts to sell and convey real property may by mutual consent be abandoned, and when so abandoned each party is entitled to be restored to the status quo as far as possible (91 C. J. S. 1045, et seq., §§120-122). Sometimes contracts for the sale and conveyance of real property contain provisions for rescission by one of the parties upon the default or abandonment of the said contract by the other. Although a contract to sell and convey real estate may be abandoned by the mutual agreement of the parties, or may be declared forfeited by one party for the breach of the other, often the facts of the abandonment or forfeiture may not be a matter of public record so that the said contract constitutes a cloud on the title of the vendor.

In connection with the forfeiture of the contract by the vendor for the vendee's default, or in connection with an abandonment by mutual consent of the parties, the vendee may give to the vendor a quit claim or other type deed of conveyance not in satisfaction of an indebtedness due by the vendee to the vendor, but to clear the vendor's title of the abandoned or forfeited contract. In this case the vendor may not be interested in enforcing the obligation of the vendee under the contract, and may have in effect abandoned its enforcement.

The consideration for deeds of conveyance is the measure of the documentary stamp taxes due thereon under §201.02, F. S. The consideration for a quit claim deed given for the purpose of clearing the title of an owner, including the title of a vendor under a contract to convey, would be the measure of the documentary stamp taxes due and payable thereon. In our opinion of Oct. 11, 1960 (060-165) the consideration there considered for a conveyance was the release of an indebtedness due by a vendee. That opinion is here adhered to under like circumstances. However, where the consideration for a conveyance is otherwise the actual consideration paid or to be paid is the measure for determining the taxes due.

060-200—December 16, 1960

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS  
APPLICATION OF INSTALLMENT SALES LAW TO CON-  
STRUCTION INSTALLMENT CONTRACTS—§§520.30-520.42,  
F. S.**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Does the so-called Florida retail installment sales law have any application to the installment payment agreements made in this state in connection with construction contracts?**

Certain building or construction companies operating in this state build houses under the FHA and VA insured mortgage programs of the federal government, for individuals on their own real property, and the so-called shell homes, agreeing to pay the consideration for such construction contracts and work in installments, in many instances executing and delivering to the builders

notes payable in installments secured by mortgage or other instrument upon the improved real property. Are these installment contracts and promissory notes within the so-called retail installment sales law (Ch. 59-414, §520.30-520.42, F. S.)? The title to said Ch. 59-414 refers to it as an act "to regulate the sale of certain goods in retail installment transactions, including the regulation of retail installment contracts and involving accounts . . . ." (Emphasis supplied.)

The term "goods," as used in the said law, is defined as meaning "all personalty, including certificates or coupons issued by a retail seller exchangeable for personalty or services." A retail installment contract entered into in this state pursuant to which "goods or services may be paid for in installments." A retail installment transaction "means a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract." A retail seller is defined as a person "regularly engaged in, and whose business consists to a substantial extent of, selling goods to a retail buyer." A retail buyer is defined as a "person who buys goods or obtains services from a retail seller." (§520.31, F. S.). A study of §520.34, F. S., regulating retail installment contracts, clearly contemplates the sale at retail of goods and the furnishing of services, which is defined as work or labor furnished.

We find nothing in said §§520.30-520.42, F. S. (Ch. 59-414), indicating any intent to include therein installment contracts and promissory notes relative to real property or the construction of improvements thereon by a contractor, pursuant to a construction contract. However, should the agreement be one for the sale of personal property needed for the construction, and the furnishing of the services necessary for the construction, as distinguished from a contract to furnish a completed building, then such an agreement might be within the law.

Presuming that the agreement in question is one for the construction and furnishing of a completed building, or a part thereof, and not for the sale of personal property and furnishing of services, the above question is answered in the negative.

060-201—December 16, 1960

#### TAXATION

#### IMPROVEMENTS ON REAL PROPERTY—AD VALOREM TAXES AGAINST

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Are improvements, constructed on real property leased from a municipal corporation, subject to taxation as the property of the lessee?**

This question does not extend to the question of the taxation of the leased property itself because of the lease to an individual by a municipal corporation for private business purposes (see *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470), but relates to the taxation of the improvements placed on the leased property by the lessee from the municipality as property of such lessee.

In *Park-N-Shop, Inc., v. Sparkman*, Fla., 99 So. 2d 571, it was held that the laws of this state do not provide for the taxation of leasehold interests. The question seems to contemplate the levy



of ad valorem taxes against the improvements themselves, evidently as the property of the lessee. The ownership and right to remove improvements made by a lessor or tenant are determined by the intention of the parties as evidenced by the lease and the circumstances of the case. The lease agreement may determine the ownership of such improvements. In the absence of an agreement to the contrary, a lessee or tenant may not remove improvements which become an integral part of the property and which cannot be removed without material injury to the premises (51 C. J. S. 1133-1138, §394). Permanent type structures placed upon realty, in the absence of an agreement otherwise, usually become part and parcel of the realty, and do not become the property of the lessee or tenant for purposes of taxation.

In the light of these observations, the above question must be answered in the negative, unless by agreement, by and between the landlord and the tenant, there is a severance of the improvements from the land so as to make them the personal property of the tenant.

060-202—December 16, 1960

#### TAXATION

CLAIM FOR EXEMPTION UNDER §1, ART. IX AND §16, ART. XVI, STATE CONST., BY ELECTRICAL WORKERS BUILDING ASS'N, INC.—§192.06(10), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTION:

**Is the Electrical Workers Building Ass'n., Inc., a nonprofit corporation, and like and similar organizations, entitled to tax exemption for buildings owned by them when used for lodge and similar purposes?**

Sections 1, Art. IX, and 16, Art. XVI, State Const., make provision for exempting from taxation properties "*held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes," which sections have been construed as limitations on the power of the state legislature to provide for the exemption from taxation of any class or classes of property not mentioned in the said constitutional provisions. The right to exemption under said constitutional provisions, being limited as aforesaid, the legislature may not legally provide for the tax exemption of other property, in the absence of specific constitutional exemption. The exemptions provided by said constitutional provisions and statutes and laws adopted pursuant thereto, are "determined by the use and ownership of the property," not by its ownership alone. To be entitled to tax exemption the property claimed to be exempt must be "*held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes." (A.G.O. 060-158, Sept. 19, 1960).

The fact that a corporation is organized as a nonprofit one is not sufficient to entitle it to tax exemption for its property but for it to be entitled to exemption from taxation for its property it must demonstrate, unless the same is self-evident, that such property is "*held and used exclusively*" for one or more of the above mentioned purposes. The supreme court of this state, in *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, held that the lodge hall and business offices of a labor union were not for that reason alone entitled to tax exemption. There appears to have been no showing made in

that case that the property was being held and used exclusively for one or more of the purposes mentioned in the above sections of the Florida Constitution. *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, involved a building in Jacksonville belonging to the Elks Club, Inc., claimed to be exempt from taxation, however, failing to find that the property was held and used exclusively for one or more of the purposes mentioned in the constitution exemption, exemption was denied.

Whether the Electrical Workers Building Ass'n, Inc., a non-profit corporation, and like and similar organizations, are entitled to tax exemption for the buildings used by them when used for lodge and similar purposes depends upon whether or not such property is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." In this connection note §192.06(10), F. S., relating to labor organizations.

060-203—December 19, 1960

#### TAXATION

EXEMPTION—GIRL SCOUTS—§192.06, F. S.; §1, ART. IX, §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are lands in this state owned and held by girl scout councils entitled to exemption from ad valorem taxes?

Girl scouts of America was incorporated by congress in 1950, as a "body corporate and politic of the District of Columbia" (§§31-39), title 36, U. S. code). The purpose of this organization is "to promote the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, thriftiness and kindred virtues among girls, as a preparation for their responsibilities in the home and for service to the community, and to direct and coordinate the girl scout movement in the United States, its territories and possessions . . ." This charter granted the girl scouts of America is substantially the same as the one granted the boy scouts of America in 1915 (§§21-29, title 36, U. S. code).

An examination of the annotation in 116 A. L. R. 378-380, and the opinions in *Charter Oak Council, Inc., Boy Scouts of America v. New Hartford*, 121 Conn. 446, 185 A. 575; *Fort Orange Council, Inc., Boy Scouts of America v. French*, Vt., 125 A. 835; *Greater Lowell Girl Scout Council, Inc., of America*, 100 N. H. 24, 117 A. 2d 325; *St. Louis Council, Boy Scouts of America, v. Burgess*, Mo., 240 S. W. 2d 684; *Camden County Council, Boy Scouts of America v. Bucks County*, 13 Pa. Dist. & Co., 213; *Tharpe v. Central Georgia Council of Boy Scouts of America*, 185 Ga. 810, 196 S. E. 762, 116 A. L. R. 373; reveal that boy and girl scout organizations have generally been held to be charitable organizations. In some cases these organizations were said to be chartered and chartered corporate units of the boy or girl scouts of America.

*St. Louis Council, Boy Scouts of America v. Burgess*, supra, involved a reservation of about 2300 acres of land, then without camp buildings thereon, but used every week by the boy scouts, and the training of their leaders, and which area was always open for use by the scouts. This was held to be a charitable use of the property. The size of the reservation was not deemed excessive by the court when it took into consideration that the area served by it

had resident therein about 92,680 boys of scout age, who were deemed qualified to become scouts. To a like effect see *Tharpe v. Central Georgia Council of Boy Scouts of America*, supra, where the court considered that all boys of scout age were prospective scouts and qualified to become such.

From the above and foregoing, it appears that the girl scouts of America, and their local organizations, are charitable and educational in character so that their property actually held and used exclusively for their charitable and educational purposes, qualifies such property for tax exemption under §§1, Art. IX, and 16, Art. XVI, State Const., and §192.06, F. S. Should the taxing authorities find that the property of girl scout councils in this state is held and used exclusively for scouting purposes, then the same should be granted tax exemption under and pursuant to said constitutional and statutory provisions.

060-204—December 27, 1960

#### CITIES AND TOWNS

MUNICIPAL OFFICERS; QUALIFICATIONS; §3, ART. IV, §4, ART. III, STATE CONST., §165.04, F. S.

To: *Sam Y. Allgood, Jr., Attorney, New Port Richey*

#### QUESTION:

**Are the elective officers of a municipality required to be duly qualified and registered electors of such municipality, in the absence of such a requirement in their corporate charters or duly adopted municipal ordinances?**

You advise that neither your municipal charter nor its municipal ordinances require that its municipal officers be duly qualified and registered electors of the municipality; this advice we accept and, for the purposes of this opinion, presume that neither your municipal charter nor any of its ordinances require its municipal offices to be filled by duly qualified and registered electors of the municipality. Although the state constitution requires that the governor (§3, Art. IV) and members of the state legislature (§4, Art. III) be qualified electors, we find no like or similar requirement in the said state constitution requiring that officers of municipal corporations be qualified electors. Our examination of the Florida Statutes fails to reveal any general statutory requirement that municipal officers be qualified and registered electors of the municipality.

This question seems to be one dependent upon constitutional and statutory requirements (Annotation in 128 A. L. R. 1117-1120; 3 McQuillin, *Municipal Corp.*, 3rd Ed., 246; 62 C. J. S. 917, §478; *State v. George*, 23 Fla. 585, 3 So. 81; Advisory Opinion, 62 Fla. 1, 57 So. 351, text 352). The court, in *State v. George*, 23 Fla. 585, 3 So. 81, text 83, after making reference to the fact that the constitution contained no general requirement that all public officers be qualified electors, and to the constitutional qualification of electors, remarked that the retention of such qualifications "for voters and not for officers indicates that, in the view of the convention, when officers were to be elected, the provision for duly qualified electors would furnish sufficient safeguard against the choice of unsuitable persons. But apart from this, it is held to be the law that 'municipal officers may be elected from non-residents

of the corporation where there is no statute or constitution prohibiting it'. . . . There is no absolute connection between voters and officers by which the qualification of the latter should necessarily be determined by those for the former. Each is regulated to its own end, the former always by special provision, the latter sometimes not at all, except, as in this state, the more important political and judicial places; so that, as to all other officers, the people, in the absence of other requirements, are left to their own discretion, limited only by a common understanding, equivalent to law, that prohibits electing to office any person who is not in some wise a member of the body politic." The above opinion was cited with approval and quoted from by the justices of the court in their Advisory Opinion, 62 Fla. 1, 57 So. 351, text 352. The municipal charter involved in *Tillson v. State*, 127 Fla. 215, 172 So. 918, provided that "every member of the city commission shall be a qualified elector of the city, and shall be a freeholder within the city."

There being no constitutional or general statutory requirement that municipal officers be duly qualified and registered electors, and presuming the absence of any such requirement in the municipal charter or ordinances, the above question is answered in the negative. Accepting your advice that the charter and municipal ordinances of the city of Port Richey contains no requirement that its municipal officers be duly qualified and registered electors of the city, and there being no such requirement in the state constitution or its general laws, its municipal officers are not required to be duly qualified and registered electors. Section 165.04, F. S., relates to the electors voting for municipal officers and not the officers themselves.

060-205—December 28, 1960

### CORPORATIONS

#### REGISTRATION OF FOREIGN NONPROFIT CORPORATION DOING BUSINESS AS COOPERATIVE APARTMENTS—CH.

617; §617.01 AS AMENDED BY CH. 59-427, §617.11, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

#### QUESTION:

May a corporation without capital stock chartered under the nonprofit corporation acts of another state for the purposes of operating and managing a cooperative apartment house on a nonprofit basis be permitted to do business in Florida as a nonprofit corporation under the provisions of §617.11, F. S.?

This office previously ruled in A. G. O. 055-214 that foreign corporations of the type discussed herein were not eligible to transact business as nonprofit corporations in Florida because they could not in most cases meet the then existing requirements of Ch. 617, F. S. In the interim the legislature has seen fit to amend Ch. 617, F. S., through the enactment of Ch. 59-427 and a comparison of the old and new §§617.01, F. S., is set out below.

Section 617.01, F. S. 1957, provided in part as follows:

Any five or more persons, wishing to form a religious society, lodge of masons, or any other similar order, debating or literary society, library company, benevolent, or charitable association, scientific institution of learning, or



cemetery company, may become incorporated in the following manner: . . .

The amended §617.01, F. S., 1959, now provides:

(1) Corporations may be organized and incorporated under this chapter for any one or more lawful purposes not for pecuniary profit; provided, however, that corporations not for profit which may be incorporated under any other law of this state governing particular types of corporations may not be incorporated hereunder.

(2) As used in this chapter "corporation not for profit" means a corporation no part of the income of which is distributable to its members, directors or officers.

Apparently the 1959 legislature considered the express classification of nonprofit corporate purposes appearing in the statute prior to amendment as being too limited to permit all corporations not for profit and not authorized to register under other laws of this state from attaining corporate status. It appears that the legislature by the 1959 amendment intended to authorize nonprofit corporate status in Florida for corporations of the type under consideration. This fact was recognized in A. G. O. 060-37 which superseded and rescinded portions of the previously rendered A. G. O. 055-214, mentioned above. Subsequent to the release of A. G. O. 060-37 this office furnished two informal letters to you dated May 2 and May 24, 1960, in response to your inquiry as to whether nonprofit corporations engaging in the business of operating cooperative apartment houses and showing no evidence of capital stock or earnings may be registered as foreign nonprofit corporations in Florida in the light of A. G. O. 055-214 and 060-37. At that time we replied substantially as follows: While not specifically discussed in opinion 060-37, the question now presented was considered at the time opinion 060-37 was written and this office was of the opinion that the type of corporations discussed in opinion 055-214 and being discussed herein which were operating under nonprofit charters issued in their home states could qualify in Florida as foreign nonprofit corporations if they could meet the requirements of §617.11, F. S.

In the event any corporation should abuse this privilege and go beyond the nonprofit scope of §617.01, F. S., and attempt to utilize the nonprofit corporate entity for purposes other than for which it was intended, i.e., large purchases and resale of consumer goods in connection with the operation of the housing co-op, communal improvement programs such as beautification of streets surrounding their homes, etc., then such activities by corporations of this nature would constitute a violation of the laws relating to nonprofit corporations and would result in petitions for corporate dissolution being filed, the institution of quo warranto proceedings by the attorney general or criminal prosecution of the corporate members under applicable criminal laws.

Briefly stated, this office is of the opinion the broad language placed in §617.01, F. S., by the 1959 legislature now authorizes foreign nonprofit corporations with objects such as those described in the question propounded herein to do business in Florida under the provisions of §617.11, F. S. It is contemplated, however, that the nonprofit corporation will not have any earnings. Instead its total funds in this instance will be moneys invested in or borrowed to finance cooperative apartments for the benefit of the cooperative membership and no others.

Conditioned upon the remarks set out above, your question as stated herein is answered in the affirmative.

060-206—December 28, 1960

### JUVENILE COURTS

POWERS OF ARREST—COUNSELORS AND ASSISTANT COUNSELORS, BASIS FOR—§§12 and 25, ART. V, STATE CONST., CH. 39, §§39.03, 39.17(4) AND 901.15, F. S.

To: *Alton Murray, Counselor, Juvenile Court Palm Beach County, West Palm Beach*

#### QUESTION:

May a juvenile court counselor or assistant counselor, who has been appointed a deputy sheriff, pursuant to §39.17(4), F. S., and has duly qualified as such, arrest an adult for contributing to the delinquency of a minor based upon the signed statement or courtroom testimony of such minor?

Juvenile courts of this state, both those presided over by juvenile judges and those presided over by county judges as ex officio juvenile judges, operate under the authority and limitations of §12, Art. V, State Const., as implemented by Ch. 39, F. S. The courts exercise jurisdiction over juvenile offenders and are not courts of criminal jurisdiction. The offenses contemplated by the above stated question are crimes committed by adults, subject to the criminal statutes of the state, and not acts of delinquency by juveniles. Generally speaking, the constitution contemplates that acts of delinquency by juveniles are those acts which would, if committed by adults, constitute criminal offenses. The provisions of §39.03, F. S., for the taking of juvenile offenders into custody, do not apply to or regulate the arrest of adults for crimes, even those offenses constituting crimes against children. The question posed by the request seems to contemplate arrests without warrants.

Arrests by peace officers without warrants are regulated by §901.15, F. S., which section would seem to apply to arrests for crimes against juveniles as well as to other criminal offenses. Under this section arrests may be made without a warrant where a felony or misdemeanor has been committed in the presence of the peace officer, or where a felony has been committed and the peace officer has reason to believe the person arrested committed it. Such an arrest may also be made when the arresting officer has knowledge that a warrant has been put into the hands of a peace officer for the arrest of the person taken into custody. This section seems to control arrests by juvenile court counselors, who have been appointed and qualified as deputy sheriffs, when arresting adults, even in connection with crimes committed against juveniles.

Doubtless the intent and purpose of §39.17, F. S., authorizing the appointment of juvenile counselors and assistant counselors as deputy sheriffs, were to enable them to enforce the statutes and laws relative to criminal offenses against juveniles; however, we find nothing in the statutes showing any intention or purpose on the part of the legislature to extend their power of arrest over adults beyond the limitations of said §901.15, F. S. Signed statements of juveniles filed in the juvenile court, either with the judge

or a counselor or clerk, may be acted on by the judge, who appears to be a judicial officer within the purview of §25, Art. V, State Const., and as such conservators of the peace authorized to issue warrants, based upon such information, for the arrest of such offenders against juveniles. Juvenile court counselors and assistant counselors, who have been appointed deputy sheriffs, are limited in making arrests without a warrant, of adults, by said §901.15 and must conform to its limitations.

Juvenile court counselors and assistant counselors, who have been appointed and qualified as deputy sheriffs, are limited by the provisions of §901.15, F. S., when making arrests without warrant, to the same extent that sheriffs and other peace officers are limited by the said section. Usually signed statements by juvenile and courtroom testimony of minors do not justify arrests without warrant, and arrests based upon such evidence should be by warrant issued, where such evidence is sufficient, by a committing magistrate.

060-207—December 29, 1960

**TAXATION—TANGIBLE PERSONAL PROPERTY TAX  
TAXATION OF STOCK IN TRADE HELD FOR EXPORT ONLY  
—BEGINNING OF EXPORTATION**

*To: Ray E. Green, State Comptroller, Tallahassee*

**QUESTION:**

**Is tangible personal property, held in stock or warehouse storage in this state for purposes of export sales only, subject to Florida's tangible personal property taxing statutes?**

The exporter in question maintains a place of business in an international airport within this state from which cigarettes, intoxicating liquors, and other items of personal property are sold for common carrier delivery beyond the boundaries of the U. S. Although the sales transaction is made and completed within this state, delivery of the merchandise purchased is to be made through common carrier beyond the boundaries of the U. S. and Florida. The cigarettes and intoxicating liquors maintained by the exporter for export trade are maintained in federally authorized bonded warehouses subject to strict rules and regulations concerning withdrawals therefrom, and the payment of the government taxes thereon unless sold and delivered in export trade. Such cigarettes and intoxicating liquors are purchased by the exporter, some within the U. S. and some through imports, without the payment of government taxes, conditioned upon export sale and delivery only, and under rules and regulations requiring the transportation and delivery thereof, in government sealed containers or maintained in government controlled bonded warehouses until sold as exports, and permitting no domestic sales unless the government taxes are paid. Such merchandise, whether purchased by the exporter within or without the U. S., may be said to be specifically earmarked for export sale, and may be diverted therefrom only by compliance with applicable federal rules and regulations. There is no evidence of the commingling of merchandise earmarked for export sale with merchandise held for local or domestic sale.

As to merchandise earmarked for export sale, "there must be a point of time when they (such property) cease to be governed

exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation." (Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715, text 718; Empresa Siderurgica S. A. v. Merced County, 337 U. S. 154, 69 S. Ct. 995, 93 L. ed. 1276, text 1279). "Goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey" (Empresa Siderurgica, S. A. v. Merced County supra, citing Coe v. Errol, supra; Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. ed. 309, text 312), "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." (Empresa Siderurgica, S. A. v. Merced county, supra, L. ed. text 1280). It was further stated in the cited case that "it is not enough that on the tax date there was a purpose and plan to export this property, nor is it sufficient that in due course that plan was fully executed." "It is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it" (Empresa Siderurgica, S. A. v. Merced County, supra, L. ed. text 1280 and 1279.) The exportation of goods is not "begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." until then they are "a part of the general mass of the property of the state and subject to its jurisdiction" (Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. ed. 237, text 243 and 244).

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of movement. . . . The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption. . . ." (Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131, text 136). In this connection see also annotation in 11 A. L. R. 2d 938-948, where the author sums up the rule as gleaned from the reported cases included in the annotation, as follows:

It is well established as a broad general rule that the mere fact that property is intended or destined for removal from a state does not impress it with the character of interstate or foreign commerce, so as to render it immune from local taxation by virtue of the operation of the commerce clause (Art. 1, §8) of the Federal constitution, and that such immunity attaches when, but not until, the property has been actually started toward its destination outside the state in a movement which is intended to be continuous except for such delays as are incident to the particular mode or means of transit. As frequently stated, goods do not cease to be part of the general mass of property in a state, subject, as such, to taxation therein in



the usual way, until they have been shipped or started upon transportation to another state or country in a continuous route or journey.

In cases such as the one before us it is necessary to determine whether an initial interior movement is merely intra-state or preparatory in character, or whether it constitutes an integral part of an interstate movement or exportation. The conclusion may be affected by various elements and factors, and each case must be determined largely in view of the particular facts and circumstances involved. The fact that articles intended for shipment in foreign commerce have had work done upon them to prepare them for such shipment does not immunize them from local taxation. (*Federal Compress and Warehouse Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. ed. 622). The fact that a person's property may be in a federal warehouse, or a warehouse under federal control, does not confer upon him immunity from state taxation, or convert him or his business into an agency or instrumentality of the federal government. (*Federal Compress Warehouse Co. v. McLean*, supra, L. ed. text 627). The court, in *Von Hamm-Young Co. v. San Francisco*, 29 Cal. 2d 798, 178 P. 2d 745, text 750, said that the test for determining whether goods were in transit in interstate or foreign commerce so as to be immune from state taxation is "the certainty that the goods have been committed to a movement outside of the state and will not be diverted into the channels of local trade." The placement or assembling of logs or other forest products along or near a watercourse to be thereafter floated out of the state at a convenient time, or when conditions permit, is generally treated as a mere preparatory operation or movement which does not exempt them from local taxation prior to the commencement of their actual movement downstream. (Annotation in 11 A. L. R. 944-948). The same rule was applied to ice cut and stored in one state for sale to nonresidents as and when needed (*John Hancock Ice Co. v. Rose*, 67 N. J. L. 86, 50 A. 364). Where cargoes of timber, corn, and other property were purchased and stored for bulk shipment, according to previous arrangement, to points outside of the state, such has been held to be part and parcel of the shipment and protected by the import and export clause of the federal constitution. (Annotation in 11 A. L. R. 944-947).

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80, oil and oil products delivered in the tanks of an ocean going oil tanker, for delivery to a designated purchaser in another country were held to be the beginning of the export. In *New York v. Knight*, 192 U. S. 21, 24 S. Ct. 212, 48 L. ed. 325, text 328, it was stated that the carrying of goods "in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of the journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce." (*Cornell v. Coyne*, 192 U. S. 418, 24 S. Ct. 383, 48 L. ed. 504, text 508). In *C. V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248, text 252, 112 A. L. R. 562, a state statute levying a 1¢ per box tax on citrus fruit grown in Florida was involved, which was questioned on the ground that it was a

burden on interstate and foreign commerce; concerning which the court said that a shipment of fruit does not enter into interstate or foreign commerce until "it is loaded on the cars or other conveyance, or otherwise delivered to a carrier, or is assembled for transportation to begin its journey from one state (or country) to another . . . a commodity does not acquire the character of an export until it is loaded or delivered to a "carrier to begin journey out of the jurisdiction of its origin."

In *Federal Compress and Warehouse Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. ed. 622, and *Chassaniol v. Greenwood*, 291 U. S. 584, 54 S. Ct. 541, 78 L. ed. 1004, cotton buyers contended that cotton purchased and sold by them was in commerce from the time acquired by them, because, as claimed by them, the cotton was destined for ultimate shipment to some other state or country from the time acquired by them, said cotton having been acquired by them "for resale or to fill contracts for sale of cotton" in other states or countries; this contention was rejected by the court, on the ground that "ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for sale and shipment in interstate or foreign commerce." There is little, if any, legal distinction between these facts, and the purchasing and warehousing of cigarettes and intoxicating liquors for the purpose of making sales or filling orders for the same to be delivered as exports beyond the boundaries of the U. S. and Florida. The cigarettes and intoxicating liquors are the property of the importer acquired in preparation of export sales, but are no part of the exports to be made therefrom until sold by the exporter and by him delivered to a common carrier for delivery to the purchaser beyond the boundaries of the U. S. and Florida. The exporter does not hold title to the property as an export, but holds it merely *in preparation for an export sale*; this holding, however, is prior to the exportation of the same. The property held in preparation for exportation is not an export within itself, although the sale and delivery, from the stock in trade held for export, for purposes of export would be an export within the constitutional provisions above mentioned.

From the above and foregoing, the above question is answered in the affirmative, except to the extent that the stock of goods may be imports within the purview of our opinion of Sept. 22, 1960 (060-161) and exempt thereunder.

060-208—December 30, 1960

#### REGULATION OF TRADE AND COMMERCE

TRADING STAMPS—REGULATION—PARTIAL DISCONTINUATION OF BUSINESS—CH. 559, PART I; §§559.01-559.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

#### QUESTIONS:

1. Must a trading stamp company, after giving notice of its intention to cease or suspend the redemption of its stamps in Florida, continue to maintain a redemption store in this state for not less than 90 days?

2. May a trading stamp company, after giving the said 90-day notice, service existing accounts and redeem outstanding stamps from a place of business located in another state?

Section 559.04, F. S., provides that "no trading stamp company shall distribute trading stamps in this state or shall redeem trading stamps hereafter issued therein until it has filed with the comptroller of Florida: (1) a statement of registration accompanied by a sample of its stamps, collection books, catalogues, . . . (2) a bond payable to the comptroller." It appears from the statutes (§§559.01-559.06, F. S.) that the requirements of said §559.04 are applicable to all trading stamp companies (as defined in §559.01, F. S.) doing a trading stamp business within this state, and not merely to those maintaining redemption stores within the state. In fact, there appears no specific requirement that trading stamp companies maintain redemption stores within Florida. Question 1 is, therefore, answered in the negative, so long as adequate provision for redemption is made and is reasonable and sufficient.

The purpose and intent of said §§559.01-559.06, F. S., is the protection of the people of Florida receiving trading stamps and to insure redemption, under the police power of the state. Shortly prior to the enactment of the statute, a trading stamp company of another state, but with a large number of trading stamps out in West Florida, failed financially, resulting in the loss of such stamps and their redemption value; this statute was designed to prevent such loss to residents in the future. This seems justified as a police measure (*Sligh v. Kirkwood*, 65 Fla. 123, 61 So. 185, affirmed 237 U. S. 52, 35 S. Ct. 501, 59 L. ed. 835; 16 C. J. S. 925, et seq., section 188; 16 C. J. S. 937, §194, note 29.15). The purpose of the bond required of trading stamp companies, by §559.04(2) is to insure the performance of trading stamp company's obligation to redeem its trading stamps issued through retailers in this state, when they are duly presented for redemption by their rightful holder. Question 2 is, therefore, answered in the affirmative, so long as they maintain the bond requirements of said §559.04 so as to protect the rightful holder of trading stamps issued by them through local retailers.

060-209—December 30, 1960

#### TAXATION

DOCUMENTARY STAMP TAXES—OBLIGATIONS BROUGHT INTO STATE FOR COLLECTION—CH. 201, §§201.01 AND 201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

#### QUESTION:

Are contracts for the purchase and sale of real property located in this state, made, executed and delivered in other states, when sent into this state for purposes of collection only, subject to taxation under Ch. 201, F. S.?

The written obligation was made, executed and delivered in another state and appears to be held by its owner in a state other than this state, so that it, as intangible personal property, probably has a situs in another state. The question posed is whether the bringing of the written documents into Florida for the purpose of collecting the installments due or to become due thereon subjected it to taxation under Ch. 201, F. S. This chapter was derived from Ch. 15787, 1931, which, according to its title, levied and imposed "an excise tax on documents to raise revenue for the sup-

port of the state government." In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, text 416, the court said that "the documentary stamp tax is an excise tax on the promise to pay." In *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 515, 75 L. ed. 1126, text 1128, the court was considering a substantially identical South Carolina documentary stamp taxing statute (see footnote 1), held that the South Carolina tax was "an excise tax of a familiar sort, levied with respect to the creation of instruments within the state." In *State v. Gay*, Fla., 90 So. 2d 132, text 134, the court remarked that it was of the view that Florida's documentary stamp tax "is more nearly of the nature of a transaction tax that is imposed upon the particularly described transactions when they occur within the limits of this state."

In *State v. Gay*, supra, the Florida court quoted with approval the statement by the U. S. supreme court in the *Graniteville Mfg. Co.* case, supra, that the tax "is an excise tax of a familiar sort, levied with respect to the creation of instruments within the state . . . . It is simply a tax levied in relation to an act done within the state in making an instrument." In contracts to purchase and sell real property, which contain a written promise to pay money on the part of the purchaser, the documentary stamp taxes are on that written promise to pay. Section 201.01, F. S., declares an intention to impose a tax upon obligations and documents made, signed, executed, issued, sold, removed, consigned, assigned, or shipped, in this state. Section 201.08, F. S., imposes a tax "on promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages or other compensation, made, executed, delivered, sold, transferred or assigned in the state." It is noted that the words *made, executed, sold* and *assigned* are used in both said sections, the words *signed, issued, removed, consigned* and *shipped* are used in §201.01, but not in §201.08, while the words *delivered* and *transferred* are used in §201.08 but not in §201.01. Other sections of said chapter 201 differ in a similar manner with said §201.01.

When we note that the title to the original act establishing documentary stamp taxes in this state referred to the tax as "an excise tax on documents," that the court in the *Plymouth Citrus Growers* case referred to the tax as "an excise tax on the promise to pay," and in *State v. Gay*, Fla., 90 So. 2d 132, as a "transaction tax," and also in the *Plymouth Citrus Growers* case, citing from the *Graniteville Mfg. Co.* case, as in the nature of a transaction tax on transactions occurring in this case, we are inclined to the view that the tax is upon the creation of the taxable document or transaction, including acts done in that connection. The terms *make, sign, execute* and *issue*, seem to relate the actual creation of the instrument, while the words *remove, consign, assign* and *ship* relate to transactions in connection with the making of the instrument necessary or used in the creation thereof.

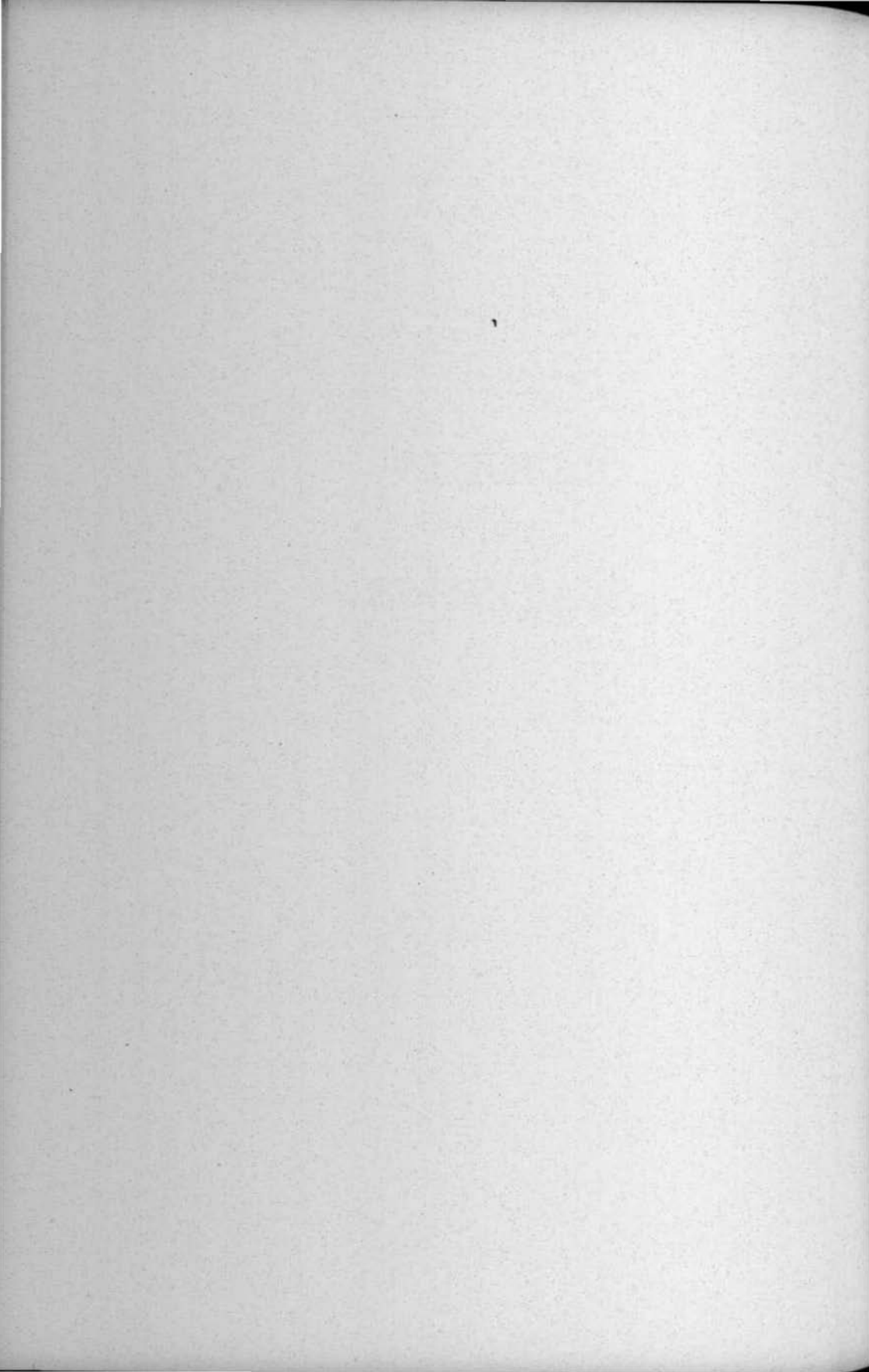
There is indication in *U. S. v. Shubert*, 348 U. S. 222, 75 S. Ct. 277, 99 L. ed. 279, text 285; *U. S. v. Southeastern Underwriters Ass'n*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440, text 1453, and other cases, that interstate transportation of money and intangibles may constitute interstate commerce. This raises the question of whether the transmittal of a promissory note or other negotiable instrument from one state to a banking institution or trust company in another state for collection and the transmission of the money collected back to the person, firm or corporation sending the same for collection may or may not constitute interstate commerce. It is



stated in 15 C. J. S. 304, §26, that "collection of the purchase price of goods sold in interstate commerce is a legitimate part of such commerce and the state cannot obstruct or hamper such collection." The recovery of articles under a contract of sale amounts to a collection within this rule (*Mergenthaler Linotype Co. v. Gore*, 118 Fla. 889, 160 So. 481). These cases seem to indicate that where a written obligation to pay money is sent into this state from another state, for purposes of collection, with instructions that the money so collected be transmitted to the sender, such a transaction would likely constitute an interstate one.

In the light of these observations, we do not think that the mere transmittal of a written obligation to pay money, whether in the form of a promissory note or otherwise, from another state into this state for the purposes of collection brings it within the purview of Ch. 201, F. S., and especially §201.08 thereof.

**REPORTS  
AND  
STATISTICS**



## 1960 CONSTITUTIONAL AMENDMENTS

The 1959 Legislature adopted eight resolutions proposing amendments to the Florida Constitution. One of these, proposing to amend Article VII by providing a formula for reapportioning the Senate and House of Representatives, was submitted to the electorate of the state at a special election in November, 1959, and was rejected. One, proposing an amendment to Article XII by providing that the Superintendent of Public Instruction of Broward county be appointed by the County Board of Public Instruction, was not placed on the 1960 ballot since its submission to the electorate for ratification was subject to a county referendum, which failed. The six remaining proposed amendments were placed on the 1960 general election ballot; two of them were defeated and four were ratified. The four ratified are set forth below.

Art. V, §5

### JUDICIAL DEPARTMENT ARTICLE V

#### SECTION 5. District courts of appeal.—

(1) APPELLATE DISTRICTS. The state shall be divided into three appellate districts of contiguous counties as the Legislature may prescribe, and there shall be organized a district court of appeal in each district.

(2) ORGANIZATION; NUMBER AND SELECTION OF JUDGES. There shall initially be three judges of each district court of appeal. The Legislature may provide not more than two additional judges for any district court of appeal and may reduce the number for any district to not less than three. Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

Art. VI, §2

### SUFFRAGE AND ELIGIBILITY ARTICLE VI

SECTION 2. Registration of electors.—The legislature, at its first session after the ratification of this constitution, shall provide by law for the registration of all the legally qualified voters in each county, and for the returns of elections; and shall also provide that after the completion, from time to time, of such registration, no person not duly registered according to law shall be allowed to vote.

The legislature may provide for the registration of electors who are members of the armed forces, and their spouses, living outside the territorial limits of the state.

Art. XVI, §4

### MISCELLANEOUS PROVISIONS ARTICLE XVI

SECTION 4B. Civil Jury Trials in Volusia County; Location in Certain Municipalities Within Said County.—The legislature



may from time to time and as the business of Volusia County may require, provide that trial by jury of all civil suits, properly triable by jury according to law, may be had and held in addition to the county seat in any municipality, within said county, designated by any circuit judge of the 7th judicial circuit. The legislature may provide also that the clerk of any court or any other court officer, within said county, shall maintain such offices within such municipality, and have available such official books and records therein, as may be necessary to accomplish the purposes of this amendment; provided, however, that the principal offices of such clerks or other officers shall not be removed from the county seat.

**SECTION 4C. Civil Jury Trials in Highlands County; Location in Certain Municipalities Within Said County.**—The legislature may from time to time and as the business of Highlands county may require, provide that trial by jury of all civil suits, properly triable by jury according to law, may be had and held in addition to the county seat in any municipality within said county, designated by any circuit judge of the 10th judicial circuit. The legislature may provide also that the clerk of any court or any other court officer, within said county, shall maintain such offices within such municipality, and have available such official books and records therein, as may be necessary to accomplish the purposes of this amendment; provided, however, that the principal offices of such clerks or other officers shall not be removed from the county seat.

**SECTION 4D. Civil Jury Trials in Branch Court Houses in Brevard County.**—Civil trials by jury may be held as provided by law in designated branch court houses within Brevard County. All records of any civil trial conducted in any such branch court houses shall be filed in the main court house at the county seat.

## CONSTITUTIONAL AND STATUTORY DUTIES OF ATTORNEY GENERAL

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

### COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General in his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect

state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

### CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the supreme court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

### STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the state of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01, F. S., and §27, Art. IV., Fla. Const.).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Report to each session of the legislature such legislation as he may deem advisable concerning defects in laws.

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the statutory revision department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.50, 16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).
11. Act as legal adviser to the state auditing department (§21.091).
12. Act as emergency successor to governor's office (§22.04).
13. Report to legislature on conference of circuit judges (§26.55).
14. Represent juvenile court in certiorari proceedings (§39.14 (12)).
15. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).
16. Conduct condemnation proceedings on behalf of the board of commissioners of state institutions and on behalf of the adjutant general's office for military purposes (§73.22).
17. Conduct quo warranto proceedings (§80.03).
18. Represent the state in proceedings under the declaratory judgment law where the constitutionality of statutes is involved (§87.10).
19. Devise a suitable seal for the supervisors of registration (§98.341).
20. Examine audited reports of state executive committee and file same as public record (§103.121).
21. Report and turn over to state treasurer all perquisites fixed by law accruing from administration (§111.02).
22. Approve title to real estate in which the state is interested (§135.16).
23. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy act lands (§196.21).
24. Assist in the collection and enforcement of retail store license taxes (§204.13).
25. Assist in enforcing law in sales of businesses (§212.10 (2)).
26. Introduce proceedings to collect defaulted investments and otherwise protect state funds invested (§215.46).
27. Take necessary action on appeals by board of public instruction regarding pupil assignment law (§230.232 (3) (c)).
28. Prepare contracts for purchase of uniform school books (§233.16).
29. Approve school district bonds (§236.48).
30. Prosecute violations of school budget law (§237.23).
31. Act as legal adviser to board of trustees of the teachers' retirement system (§238.03 (9)).
32. Represent board of control in eminent domain proceedings (§240.14).
33. Conduct procedure for and act as counsel for board of commissioners of state institutions in condemnation of property as provided in §242.55 (2) (§242.58).
34. Act as legal adviser and representative of the board of trustees of the Florida state fire college (§242.61).
35. Approve bonds given by institutions receiving bodies to anatomical board (§245.14).
36. Conduct condemnation proceedings on behalf of the armory board (§250.40).
37. Act as ex officio member and legal adviser of the state civil defense counsel (§252.05).
38. Pass upon and approve regulations of district drainage board (§298.53).

39. Act as legal adviser for the state road department. (Said department, however, has a special attorney authorized by statute.) (§334.18).

40. Act as attorney for the railroad and public utilities commission (this work is negligible because of the fact that the railroad and public utility commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.31, 350.62, 350.66).

41. Assist railroad and public utilities commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).

42. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and state board of conservation (§370.02(8)).

43. Represent the state in all appeals from judgment of forfeiture to the supreme court (§372.316).

44. Enforce the vital statistics law (§382.37).

45. Bring suits to collect expenses for mentally ill or insane persons (§394.21).

46. Represent hospital licensing agency (§395.16).

47. Approve form of state treasurer's bond (§443.10).

48. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).

49. Represent the state in disbarment proceedings in the supreme court (§454.28).

50. Assist in the enforcement of the basic science law (§456.22).

51. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any medical scholarship recipient (§458.083).

52. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

53. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any dental scholarship recipient (§466.45).

54. Represent the state board of architects in judicial proceeding to which the board may be a party. However, the board is authorized by statute to secure other legal advice or service (§467.14).

55. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

56. Act as legal adviser to the state board of dispensing opticians (§484.08).

57. Act as legal adviser and represent watchmakers commission in all courts and in all legal matters affecting commission (§489.10).

58. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

59. Assist in the enforcement of laws regulating small loan businesses (§516.23).

60. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

61. Assist in enforcement of law regulating sale of liquid fuels (§526.10).

62. Investigate and rectify commercial discriminations (§§540.02-540.05).

63. Investigate contracts obstructing competition in violation of fair trade law (§541.09).



64. Enforce the anti-trust laws of the state (§542.03).
65. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).
66. Prosecute combinations against Florida meats (§544.02).
67. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).
68. Act as attorney for the state racing commission. (Said commission, however, has statutory authority to employ its special counsel) (§550.01).
69. Represent state in all appeals from judgments of forfeiture (§562.404).
70. Act as counsel for the department of agriculture (§570.10).
71. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).
72. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).
73. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).
74. Institute and prosecute to final judgment such legal or equitable proceedings as may be advisable to revoke permit, prevent its improper use or prevent foreign corporation from exercising corporate powers within state (§§617.022 and 617.11).
75. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and nonprofit cooperative associations (§§618.23, 619.09).
76. Sue to recover fines for doing business without a license (§625.17).
77. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).
78. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).
79. Represent the insurance commissioner in connection with insurance matters (§637.54).
80. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).
81. Bring proceedings to recover escheated property (§731.33).
82. Institute proceedings in appropriate court for declaratory judgment to determine whether printed matter is obscene (§847.01).
83. Bring proceedings to forfeit prize money in lotteries (§849.12).
84. Represent state in all appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).
85. Enforce laws regarding subversive activities (§§876.22-876.31).
86. Conduct extradition hearings for the governor (§941.04).
87. Act as attorney for the parole commission (§947.11).
88. Act as legal adviser to department of corrections (§944.52).
89. Furnish legal services to division of mental health (§965.01).
90. Furnish legal services to board of commissioners of state institutions in their protection of financial interests of the state with respect to claims for care and maintenance of patients of state institutions (§965.08).

## MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of commissioners of state institutions (§17, Art. IV, Fla. Const.).
2. State board of education (§3, Art. XII, Fla. Cont., §229.15).
3. Interstate cooperation commission (§13.05).
4. Trustees of internal improvement fund (§253.02).
5. State board of drainage commissioners (§298.69).
6. State budget commission (§216.01).
7. State board of conservation (§370.02(1)).
8. State board of pardons (§12, Art. IV., Fla. Const.).
9. State canvassing board (§102.111).
10. Florida securities commission (§517.03).
11. Railroad, etc., assessment board (§195.01).
12. Board for fixing values of investment securities of trust companies (§660.08).
13. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16).
14. State housing board (§424.04).
15. Department of public safety executive board (§321.01).
16. State board for vocational education (§229.08(9)).
17. State board of trustees of teachers' retirement system (§238.03).
18. State textbook purchasing board (§233.13).
19. State purchasing commission (§287.031).
20. Member of state civil defense council (§252.05).
21. Governor's cabinet (§20, Art. IV, Fla. Const.).
22. Judicial council (§43.15).
23. State merit system personnel board (§110.02).
24. Sheriff's bureau (§30.36).
25. Board of appeals of county officers' budgets (§30.49).
26. Public records screening board (§119.04).

## STATUTORY REVISION DEPARTMENT

The 1943 legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., F. S.). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

*Continuing plan of operation*—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, F. S.), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

- (1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies,

eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by reviser's bills to be submitted to each session of the legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) Making a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

*Preservation of type used.*—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

*Selection and supervision of personnel.*—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, F. S., selects a director. The director has the direct supervision and control of the depart-

ment, and with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of reviser's bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

*The reviser's bills*, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of reviser's bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation of jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of reviser's bills, the following rules and procedures are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Section that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.



(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the reviser's bills. In the preparation of reviser's bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

*Printing.*—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

# **COMPILED STATEMENT OF CASES HANDLED, OPINIONS AND MISCELLANEOUS LETTERS WRITTEN IN THE ATTORNEY GENERAL'S OFFICE**

(From Jan. 1, 1959 through Dec. 31, 1960)

## **CRIMINAL CASES**

|                               |       |       |
|-------------------------------|-------|-------|
| January 1, 1959—Cases pending |       | 277   |
| 1959—New cases—Tallahassee    | 161   |       |
| Miami                         | 65    |       |
| Lakeland                      | 31    |       |
|                               | <hr/> | 257   |
| 1959—Cases re-opened          |       | 14    |
| 1960—New cases—Tallahassee    | 148   |       |
| Miami                         | 46    |       |
| Lakeland                      | 58    |       |
|                               | <hr/> | 252   |
| 1960—Cases re-opened          |       | 10    |
| 1959-1960—Habeas corpus cases |       | 173   |
|                               |       | <hr/> |
| Total                         |       | 983   |
|                               |       |       |
| Closed cases—1959             | 365   |       |
| Closed cases—1960             | 258   |       |
| Closed habeas corpus cases    | 173   |       |
| (1959-1960)                   | <hr/> | 796   |
| January 1, 1961—Cases pending |       | 187   |

## **CIVIL CASES**

|                               |       |     |
|-------------------------------|-------|-----|
| January 1, 1959—Cases pending |       | 407 |
| 1959—New cases—Tallahassee    | 145   |     |
| Miami                         | 16    |     |
| 1960—New cases—Tallahassee    | 167   |     |
| Miami                         | 31    |     |
|                               | <hr/> | 359 |
| Total                         |       | 766 |
|                               |       |     |
| Closed cases—1959             | 88    |     |
| Closed cases—1960             | 234   |     |
|                               | <hr/> | 322 |
| January 1, 1961—Cases pending |       | 444 |

## **EXTRADITIONS**

|                                   |               |       |
|-----------------------------------|---------------|-------|
| 1959—Miscellaneous letters—16,248 | 1959—Approved | 476   |
| 1960—Miscellaneous letters—15,458 | 1959—Rejected | 51    |
| Total                             | 1960—Approved | 511   |
|                                   | 1960—Rejected | 38    |
|                                   | Total         | 1,076 |

|                |     |
|----------------|-----|
| 1959—Opinions— | 276 |
| 1960—Opinions— | 209 |
| Total .....    | 485 |
| 1959—Subjects— | 392 |
| 1960—Subjects— | 354 |
| Total .....    | 746 |

**STATUTORY REVISION**

|                            |        |
|----------------------------|--------|
| 1959-1960 letters          | 18,606 |
| Total opinions 1959-1960   | 485    |
| Total subjects 1959-1960   | 746    |
| Total letters              | 31,706 |
| Total letters (Stat. Rev.) | 18,606 |
| Grand Total .....          | 51,543 |

**WEEKLY MAILING LIST**

|                    |        |
|--------------------|--------|
| 1959-1960 Opinions | 11,660 |
| 1959-1960 Digest   | 56,250 |

SUMMARY  
of  
ADVISORY OPINIONS  
rendered the  
GOVERNOR OF FLORIDA  
by the  
SUPREME COURT OF FLORIDA  
under  
ARTICLE IV, SECTION 13,  
CONSTITUTION OF FLORIDA  
DURING 1959-1960

Prepared by David V. Kerns, Director of Legislative Reference Bureau

(Reported in 107 So. 2d through 123 So. 2d)

Supplementing summaries appearing in Biennial Reports of the Attorney General of Florida for 1953-1954, p. 757; for 1955-1956, p. 995; and for 1957-1958, p. 953.



### **ADVISORY OPINIONS**

Justices declined to answer, as not within the authorized scope of inquiry, a request for an opinion whether the civil court of record for Duval county was abolished by the enactment of Chapter 59-516, Laws of Florida, or whether a vacancy existed in the office of judge of said court for which the governor should appoint and commission a successor, because an answer would have required the justices to pass upon the constitutionality of a statute. This they declined to do in a non-adversary proceeding. In re: Advisory Opinion to the Governor, Florida 1959, 113 So. 2d 703.

### **CONSTITUTION**

Dropping of phrase, "absence from the state," in adopting devolution provision of earlier constitutions held, to indicate intention of framers of present constitution that such absence should not be cause for devolution of powers and duties of the office of governor. In re: Advisory Opinion to the Governor, Florida 1959, 112 So. 2d 843.

### **COUNTIES**

Constitutional provision adopted in 1956, granting to the electors of Dade county the authority to adopt, revise and amend from time to time a charter which was required to fix the number, terms and compensation of the county commissioners, and their method of election, held sufficiently broad to stand as organic authority for a charter provision that any vacancy in said commission should be filled by a majority vote of the remaining members or by an election called by the commission. Hence the governor's appointive power to fill a vacancy in the commission was superseded. In re: Advisory Opinion to the Governor, Florida 1959, 116 So. 2d 425.

### **ELECTIONS**

The phrase, "method of election," contained in Section 11, Article VIII, of the constitution authorizing a home rule charter for Dade county is as applicable to the filling of a vacancy as it is to the filling of an office for the full term. In re: Advisory Opinion to the Governor, Florida 1959, 116 So. 2d 425.

### **GOVERNOR**

Governor's absence from the state, under conditions whereby functions of his office would be maintained, would not constitute inability to discharge his official duties or other cause for devolution of the powers and duties of his office. In re: Advisory Opinion to the Governor, Florida 1959, 112 So. 2d 843.

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